GEE-GRA

Office-Supreme Court, U.
FILED
JAN 30 1951
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

NO...527

LARRY V. and MARGARET E. GEER, d/b/a LARRY GEER BALLROOMS,
Petitioners,

vs.

WILLIAM E. BIRMINGHAM and MILDRED L. BIRMINGHAM, as Executors of the Estate of E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
LOUIS A. PARKER,
Des Moines, Iowa.
CHRISTOPHER T. BOLAND,
Washington, D. C.
Attorneys for Petitioners.

Of Counsel:
Gallagher, Osherman,
Connor and Butler,
Washington, D. C.

INDEX.

Page

Opinions Below 2

Summary Statement of the Matters Involved 2

Jurisdiction 13

Statutes and Regulations Involved 13

Questions Presented 13

Reasons Relied on for the Allowance of the Writ 15

Conclusion 33

Brief in Support of Petition for Writ of Certiorari 34

Summary of Argument 34

Argument 36

I. The decision of the Court of Appeals in construing Section 1700 (e) of the Internal Revenue Code, as amended, and particularly the definition contained therein of a "roof garden, cabaret, or other similar place", is in error in failing to apply all the applicable rules of statutory construction 36

II. The decision of the Court of Appeals is in error in holding that the legislative history of Section 1700 (e) of the Internal Revenue Code, as amended, shows that Congress intended to include ballrooms of the type and kind operated by petitioners within the definition of a "roof garden, cabaret, or other similar place" contained in said section 38

Legislative History Prior to 1941 Amendment 40

1941 Amendment 44

1942 Amendment 50

III. The decision of the Court of Appeals is in error in attaching persuasive weight to Section 101.14 of Treasury Regulations 43 in its interpretation of Section 1700 (e) of the Internal Revenue Code, as amended 53

A. Section 101.14 of Treasury Regulations 43, being in substance a restatement of Section 1700 (e) of the Internal Revenue Code, as amended, which the Court of Appeals found was ambiguous, such regulation was equally ambiguous and, therefore, entitled to little weight in the interpretation of said statute 54

B. Section 101.14 of Treasury Regulations 43 being ambiguous, the continuous, uniform and undeviating interpretation which the Treasury Department had placed on said regulation in actual practice, was material to the meaning to be attributed to said regula-

190212

Page

tion, and the decision of the Court of Appeals is, therefore, in error in ignoring such interpretation 59

IV. The committee of Congress in which the Revenue Act of 1942 originated having expressly stated in its report that the object of such act was to increase taxes, and no contrary intent appearing in either the statute or said report, the Court of Appeals, in finding that Congress "may" have intended to reduce the amusement tax on ballrooms, entered the realm of speculation and, in so doing, is in error..... 63

V. The decision of the Court of Appeals is in error in holding that petitioners' ballroom furnished a "public performance" 65

VI. The District Court's finding of fact that petitioners' ballroom was an establishment "separate, distinct and dissimilar" from a roof garden and a cabaret was supported by substantial evidence, and the Court of Appeals is in error in making a substitute finding contrary thereto 68

VII. The Court of Appeals, in construing Section 1700 (e) of the Internal Revenue Code, as amended, misapplied the rule that a statute will be construed as to avoid absurd or unreasonable results and, in so doing, is in error 71

VIII. The Court of Appeals is in error in holding that it was not justified in refusing to follow the decision of the Court of Appeals for the Seventh Circuit in the case of Avalon Amusement Corporation v. United States, 165 F. 2d 653, "unless convinced that it was clearly wrong" 73

Conclusion 74

Appendix A 75

CASES CITED.

Avalon Amusement Corporation v. United States, 165 F. 2d 653 ..... 12, 19, 36, 61, 65

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 65 S. Ct. 1215, 89 L. Ed 1700 59

Brewster v. Gage, 280 U.S. 327, 50 S. Ct. 115, 74 L. Ed. 457 59

Burnet v. Chicago Portrait Co., 285 U.S. 1, 52 S. Ct. 275, 76 L. Ed. 587.. 58

Busey v. Deshler Hotel Co., 130 F. 2d 187 ..... 21, 22, 52

Church of the Holy Trinity v. United States, 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed. 226 71

Deshler Hotel Co. v. Busey, 36 F. Supp. 392 ..... 22, 46

F. W. Fitch Co. v. United States, 323 U.S. 582, 65 S. Ct. 409, 89 L. Ed. 472 ..... 27, 38

Grain Belt Supply Co. v. Commissioner, 109 F. 2d 490 32

Harrison v. Northern Trust Company, 317 U.S. 476, 63 S. Ct. 361, 87 L. Ed. 407 38

Helvering v. Griffiths, 318 U.S. 371, 63 S. Ct. 636, 87 L. Ed. 843 65

Pages

Hisaw v. Ellison Ridge Consol. School Dist., 189 Miss. 664, 198 So. 557 55
Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 49
Kentucky Hotel, Inc. v. Glenn, C.C.H. (1944) Par. 9349, 33 A.F.T.R. 1654 23
Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 20 S. Ct. 708, 44 L. Ed. 856 ..... 19, 31, 73
McCaughn v. Real Estate Land, Title & T. Co., 297 U.S. 606, 56 S. Ct. 604, 80 L. Ed. 879 ..... 30, 69
McDonald v. Thompson, 305 U.S. 263, 59 S. Ct. 176, 83 L. Ed. 164 66
Miller v. United States, 294 U.S. 435, 55 S. Ct. 440, 79 L. Ed. 977 59
Puerto Rico v. Shell Co., 302 U.S. 253, 58 S. Ct. 167, 82 L. Ed. 235 ..... 20, 37
Sanford's Estate v. Commissioner, 308 U.S. 39, 60 S. Ct. 51, 84 L. Ed. 20 58
Schuster's Wholesale Produce Co. v. United States, 49 F. Supp. 909 ..... 23, 46
Sioux Tribe of Indians v. United States, 316 U.S. 317, 62 S. Ct. 1095, 86 L. Ed. 1501 ..... 24, 38
Sir Francis Drake Hotel Co. v. United States, 75 F. Supp. 668 23
Smith v. Townsend, 148 U.S. 490, 13 S. Ct. 634, 37 L. Ed. 533 ..... 20, 37
Stephens v. Cherokee Nation, 174 U.S. 445, 19 S. Ct. 722, 43 L. Ed. 1041 66
Taft v. Commissioner, 304 U.S. 351, 58 S. Ct. 891, 82 L. Ed. 1393 65
United States v. American Trucking Assn's., 310 U.S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345 37
United States v. Armature Rewinding Co., 124 F. 2d 589 32
United States v. Broadmoor Hotel Co., 30 F. 2d 440 ..... 21, 22, 46
United States v. Covey Gas & Oil, 171 F. 2d 213 17
United States v. Dickerson, 310 U.S. 554, 60 S. Ct. 1034, 84 L. Ed. 1356 ..... 19, 37
United States v. Fisher, 2 Cranch (U.S.) 358, 2 L. Ed 304 ..... 20, 37
United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 54 S. Ct. 443, 78 L. Ed. 859 ..... 30, 69
United States v. Kelley, 110 F. 2d 922 32
Vermilya-Brown Co., 335 U.S. 377, 69 S. Ct. 140, 93 L. Ed. 76 ..... 20, 37
White v. Aronson, 302 U.S. 16, 58 S. Ct. 95, 82 L. Ed. 20 ..... 27, 38, 47

STATUTES.

Internal Revenue Code:
Sec. 1700 (a), 26 U.S.C. Sec. 1700 (a) 13, 44, 47, 48, 49, 51, 53, 60
Sec. 1700 (e), as amended by Sec. 542 of Revenue Act of 1941, c. 412, 55 Stat. 711; Sec. 622 of Revenue Act of 1942, c. 619, 56 Stat. 981 and Sec. 3 of Act of June 9, 1944, c. 240, 58 Stat. 273; 26 U.S.C. Sec. 1700 (e) as amended by 26 U.S.C. Sec. 1650 ..... 2, 13, 14, 15, 34, 35, 36, 37, 38, 39, 53, 54, 55, 59, 60, 65, 70, 72
Sec. 1700 (e), as amended by Section 542 of Revenue Act of 1941, c. 412, 55 Stat. 711 and Sec. 622 of Revenue Act of 1942, c. 619, 56 Stat. 981; 26 U.S.C. Sec. 1700 (e) 50, 51, 52, 53, 63, 69

Pages

Sec. 1700 (e), as amended by Section 542 of Revenue Act of 1941, c. 412, 55 Stat. 711 ..... 23, 47, 48, 57
Revenue Act of 1942, Section 622, 56 Stat. 981 ..... 21, 26, 50 68
Revenue Act of 1941, Section 542 (a), 55 Stat. 711 ..... 23, 44, 46, 48, 55
Revenue Act of 1941, Section 541 (a), 55 Stat. 710 48
Revenue Act of 1941, 55 Stat. 706, 710, 711 49
Revenue Act of 1940, 54 Stat. 523 40
Internal Revenue Code of 1939, Sections 1700 (a) and 1700 (e), 53 Stat. 862 ..... 43, 44, 49
Revenue Act of 1926, Sections 500 (a) (1) and 500 (a) (5), 44 Stat. 91 43
Revenue Act of 1918, Section 800 (a) (1), and (a) (6), 40 Stat. 1120, 1121 ..... 42, 43
Revenue Act of 1917, Section 700 (a), 40 Stat. 318 40
Revenue Act of 1917, Section 700 (c), 40 Stat. 318 ..... 41, 42, 43
Act of Congress, February 25, 1944, 58 Stat. 61 ..... 50, 51
Act of Congress, June 9, 1944 (26 U.S.C. 1650), 58 Stat. 273 50

REGULATIONS.

Treasury Regulations 43 (1926 Ed.) 55
Treasury Regulations 43 (1940 Ed.) 55
Treasury Regulations (1941 Ed.) 23, 56, 57
Treasury Regulations 43 (1941 Ed.) Sec. 101.14, as amended by T. D. 5192 ..... 13, 14, 34, 35, 53, 54, 58, 59, 60, 61, 65, 66

SENATE REPORTS.

Senate Report No. 103, 65th Congress, 1st Session, August 4, 1917, p. 12 41
Senate Report No. 1631, 77th Congress, 2nd Session, 1942-2 C.B. 504, 700 ..... 21, 22, 52

HOUSE REPORTS.

H.R. No. 45, 65th Congress, 1st Session, 1917, p. 8 40
H.R. No. 172, 65th Congress, 1st Session, September 29, 1917, pages 17, 44 41
H.R. No. 767, 65th Congress, 2nd Session on H.R. 12863 42
H.R. No. 1040, 77th Congress, 1st Session, Article V, Paragraph 4 45
H.C.R. No. 2586, 77th Congress, 2nd Session, p. 79, 1942-2, C. B. 701, 732 22
H.R. No. 2319, pages 71, 72 25
H.R. No. 2333, C. B. 1942-2, p. 372 ..... 26, 50, 51, 63, 64

MISCELLANEOUS.

Congressional Record, pages 9618-19 24
Hearings, United States Senate, 65th Congress, 1st Session, p. 385 40
H.R. 8920 ..... 24, 25, 26
New York Times, July 14, 1950, p. 1 26
T.D. 2603, December 4, 1917 42
14 C.J.S. 1200 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

NO.....

LARRY V. and MARGARET E. GEER, d/b/a LARRY GEER BALLROOMS,

Petitioners,

vs.

WILLIAM E. BIRMINGHAM and MILDRED L. BIRMINGHAM, as Executors of the Estate of E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Larry V. Geer and Margaret E. Geer, members of a co-partnership doing business as Larry Geer Ballrooms, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on November 10, 1950, in the case numbered and entitled on its docket, No. 14,140, E. H. Birmingham, Etc., Appellant, v. Larry V. Geer, et al, Appellees, which judgment reversed a decision of the District Court of the United States for the Northern District of Iowa

and remanded the cause with direction to dismiss the complaint.

OPINIONS BELOW.

The opinion of the District Court (R. 198-278) is reported in 88 F. Supp. 189. The opinion of the Court of Appeals (R. 290-300) is reported in 185 F. 2d 82.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This action was brought in the United States Court for the Northern District of Iowa by petitioners for the refund of the sum of $44.90 as cabaret tax imposed under Section 1700(e) of the Internal Revenue Code, as amended, on amounts paid by persons present inside the Laramar Ballroom on December 9, 1948, while dancing was in progress, for soft drinks, popcorn, chewing gum, candy bars, cigarettes and checkroom service.

Petitioners are a partnership, and, since 1938, have operated the Laramar Ballroom at Fort Dodge, Iowa. (Pltfs.' Ex. AA, R. 181) The ballroom is operated in portions of two adjacent buildings leased by them. One of these buildings, known as the Armory Building, houses the major portion of the space occupied by the Laramar Ballroom. Such portion consists of a part of the basement, part of the first floor and that part of the second floor consisting of a balcony. In the basement is located the petitioners' business office, a checkroom, a fountain counter, rest rooms and three wooden benches seating 15 persons. The first floor consists of a dance floor 58 x 100 feet, which can accommodate 2,000 people, a lounge with a seating capacity of 43 people, and a small lobby in which is located a box office where tickets for admission to the ballroom are sold. The balcony located on the second floor overlooking the

dance floor is approximately eight feet wide and extends around the entire dance floor at a height of ten feet. In this balcony there is a fountain counter and also 38 booths seating 152 people. The space leased by petitioners in the adjacent building consists of a room 20 feet by 70 feet connected with the dance floor by two entrances. In this area is a fountain counter and 35 booths seating 140 people, but there is no area for dancing. (Pltfs.' Ex. AA, R. 181, 182, 187, 278, 279) The total seating capacity of the ballroom, including the lounge, the space in the adjacent building, and the balcony is 343 people. (Pltfs.' Ex. AA, R. 181, 182)

Since 1939 petitioners have provided a checkroom for those of its patrons who wish to check their wraps. A ten cent charge is made for this service. The checking of wraps is entirely optional with the patrons. (Pltfs.' Ex. AA, R. 181, 184) During the time the Laramar Ballroom has been operated by petitioners, admission to the ballroom could only be obtained by purchase of a ticket at the box office located in the lobby just inside the street entrance and the presentation of such ticket to a ticket taker stationed at the door connecting the lobby with the dance floor. The purchase of an admission ticket entitled the purchaser to dance the entire evening without further charge. Such admission ticket also entitled the purchaser to use the seats in the lounge and the seats in the room in the adjacent building without further charge. (Pltfs.' Ex. AA, R. 181-183, 279-280)

The regular established admission charge to the petitioners' ballroom was 55 cents for Thursday nights prior to 9:00 P.M. and 65 cents after that hour; 65 cents for Saturday nights and 75 cents for Sunday nights. These prices include the Federal Admissions Tax under Section 1700-(a) (1) of the Internal Revenue Code. (R. 96, 97, 281) The number of people who purchased admission tickets to the ballroom and who did not avail themselves of the dancing

privileges there afforded was, and is, negligible. (R. 107, 280)

Petitioners held dances in the Laramar Ballroom on Thursday, Saturday and Sunday nights, starting in September and ending in May of each year. They also held dances there on national holidays. (R. 96) Dance bands or orchestras of local and national reputation furnished music for the dances. (R. 96, 280) Entertainment distinct and separate from the dance music has not been provided at any time. (Pltfs.' Ex. AA, R. 181, 184, 280)

On dance nights the music for dancing begins at 8:00 P.M. and ends at 12:30 A.M. of the following day. Except for two ten-minute intermissions for the orchestra during the evening, and the time taken by the orchestra members to turn their music, the dance music is continuous. The Laramar Ballroom is open thirty minutes before the dance music starts, and is closed as soon after the music stops as the patrons can get their wraps and leave. (Pltfs.' Ex. AA, R. 181, 183, 280)

Petitioners, from the time the Laramar Ballroom opens on dance nights and until the dance music ends, have available for sale to their patrons soft drinks, peanuts, popcorn, candy, gum and cigarettes. Waitresses are available from whom these items may be ordered by patrons seated at any booth. Patrons may also purchase these items at any of the three fountain counters. (Pltfs.' Ex. AA, R. 181, 183)

The prices charged for these items are as follows: Cigarettes, twenty-one cents; soft drinks and popcorn, ten cents each; peanuts, candy bars and gum, five cents each. (R. 100) With the exception of cigarettes, which for a time were sold at twenty cents per pack, the prices charged for these items have remained constant. (R. 100) The prices charged for these items in the petitioners' ballroom are the prices usually and normally charged for such items at other retail outlets. (R. 100, 281) The purchase of these items is entirely optional with the patron and the dancing privileges of a patron

are neither added to nor subtracted from by his purchase or failure to purchase these items. (R. 100, 281) The patrons are not permitted to purchase these items after the dance music is over for the evening. (Pltfs.' Ex. AA, R. 181, 183) There are no menus provided in connection with the sale of these items, and no meals or sandwiches are served by petitioners at any time. There are no facilities for cooking in petitioners' ballroom and they have neither silverware nor table linen. The only dishes used in the ballroom are water glasses and popcorn bowls. (R. 99, 100, 281) In the operation of their establishment the plaintiffs have always represented and advertised it as a ballroom or dance hall with dancing as the sole entertainment. They never represented or advertised it as a place where meals or other food was dispensed. (Pltfs.' Ex. AA, R. 181, 184, 281)

For the year 1948 the receipts from the sale of admission tickets to the Laramar Ballroom constituted sixty-seven per cent of gross income therefrom, receipts from the sale of refreshments constituted approximately twenty-seven per cent thereof, and receipts from the checkroom constituted six per cent thereof. (R. 102, 282)

In order to show that petitioners' Laramar Ballroom is not a cabaret or roof garden, according to the well known and commonly understood meaning of those two terms, petitioners called a number of witnesses from the entertainment world consisting of an official of the American Federation of Musicians (R. 40), a district manager of the American Society of Composers, Authors and Publishers (R. 29), an orchestra booker (R. 115), a representative of an amusement trade periodical (R. 132) and several ballroom operators (R. 48, 70, 80, 92). The undisputed testimony of these witnesses is now summarized as follows: The words "cabaret" and roof garden" in their commonly known and generally understood sense, refer to establishments which the public usualiy and generally patronize for

purposes other than dancing, such as to partake of food and alcoholic liquors and see a floor show. (R. 146) In order to fulfill these purposes, a cabaret seats all its patrons at tables adequate for serving a complete meal, (R. 33, 43, 63, 120, 137) provides them with an exceedingly small dance floor, (R. 43, 65) and intermittent dance music of short duration. (R. 32, 43, 63, 120, 147) This is done so that the patrons will have more time to sit around and consume plenty of food and drinks (R. 43) which are sold them at prices greatly in excess of those charged by ordinary establishments vending these same items. (R. 33, 44, 120, 139, 147) These high prices charged by cabarets for food and drinks of all kinds are necessary in order for them to recover the cost of the entertainment provided their patrons. (R. 137, 142)

In order to give as many patrons as possible still more time to eat and drink a cabaret usually opens in the late afternoon and stays open until anywhere between 2 A.M. and 6 A.M. of the following day. (R. 33, 63, 118, 138, 147)

Cabarets in their advertising uniformly stress food, drinks and floor show entertainment. (R. 33, 148)

Because of the prices charged by a cabaret and the substantial amount of food and drink consumed by the average patron thereof in the course of a "long evening", the average cost to such patron per evening is not less than $5.00 and in a good many cases not less than $10.00. (R. 39, 155) Because of this fact and the fact that cabarets do not maintain box offices and do not sell tickets (R. 63, 118, 120, 150), the receipts of cabarets are to a large extent derived from the proceeds of sales of food and drink. (R. 33, 43, 63, 65, 137, 148)

The characteristics of a cabaret enumerated above are the ones which the amusement trade generally attribute to a place of entertainment known as a cabaret or night club.

(R. 35, 45, 146) In that trade the term "night club" is synonymous with the term "cabaret." (R. 43, 47, 136)

The undisputed testimony of the above mentioned witnesses establishes that ballrooms as they are commonly and generally known have none of the foregoing characteristics. It shows that a ballroom is fundamentally a place to dance and the primary purpose of those who attend such establishment is to engage in dancing. (R. 107, 149) In order to fulfill this purpose, the operator of a ballroom provides the patrons, upon the purchase of an admission ticket at a box office for a specified price (R. 42, 72, 96, 120), with a huge dance floor (R. 33, 42) and four hours of continuous dance music, except for one or two short intermissions. (R. 34, 43, 60, 88, 104, 120, 147) The number of persons who buy admission tickets to ballrooms and do not dance is negligible. (R. 76, 92, 107, 151) Because of this fact and the fact that ballrooms do not sell food (R. 34, 44, 72, 119) but only soft drinks, popcorn, peanuts, candy and gum (R. 34, 72) and occasionally beer and cigarettes, (R. 34, 72) ballrooms provide seating for only a rather small number of its patrons, generally not exceeding 20 per cent. (R. 33, 42, 59, 74, 85, 91, 150)

Most ballrooms sell the above mentioned items of refreshment and merchandise for the convenience of their patrons. (R. 42) The prices charged for such items are comparable with those charged in ordinary retail outlets, to wit: soft drinks, 5 and 10 cents; popcorn, 5 and 10 cents; peanuts, 10 cents; candy bars and gum, 5 cents. (R. 72, 86, 87, 100) No patron is required to purchase any of these items in order to dance. (R. 87, 100) Less than one-third of the gross receipts of a ballroom are derived from the sale of these items. (R. 61, 77) Over two-thirds of the receipts of a ballroom are derived from the sale of admission tickets for dancing privileges. (R. 42, 61, 77)

An orchestra booking agent who had booked engage-

ments in ballrooms in eleven middle western and western states (R. 116) and visited most of them (R. 119) testified that ballrooms sell no liquor. (R. 119) Petitioners have never sold liquor in their ballrooms, including the Laramar. (R. 111) A former part owner of three ballrooms testified that hard liquor had never been sold therein. (R. 72, 77) A representative of Billboard Magazine testified that he knew "a very small number" of ballrooms that served liquor. (R. 157)

The average expenditure per evening by a patron of a ballroom ranges from $1.00 to $1.68 (R. 64, 156) including the amounts spent by him for admission and refreshments or merchandise. (R. 156) The inconsequential cost of refreshments and merchandise is indicated by the fact that during the year 1948 the average amount spent by a patron of petitioners' ballroom for these items was only 27 cents. (R. 102)

Ballrooms, in their advertising, stress dancing (R. 45, 61) and sometimes the name of the orchestra furnishing the music. (R. 61) No mention is made of food and refreshments. (R. 61)

Because of their above mentioned characteristics, ballrooms are classified and treated differently from cabarets by the American Society of Composers, Authors and Publishers (R. 31-34), the American Federation of Musicians (R. 41-44), the National Ballroom Operators Association (R. 103) and Billboard, the nation's largest weekly amusement magazine. (R. 135, 144, 133)

These characteristics are the ones which the amusement trade generally attribute to a place of entertainment known as a ballroom. (R. 34, 45, 149, 150)

On the evidence just summarized showing the differences between a ballroom and a cabaret or roof garden, the District Court found that "the words 'cabaret' and 'roof garden' in their well-known and commonly understood meaning

and sense have not and do not include ballrooms of the type and kind operated by the plantiffs," and that "cabarets and roof gardens are types of establishments which are separate, distinct and dissimilar from ballrooms of the type and kind operated by the plaintiffs." (R. 285)

There has been no substantial change in the space in which the petitioners operate their ballroom or in the manner in which it has been operated during the past ten years. (R. 111, Pltfs.' Ex. AA, R, 181, 279) Under date of December 20, 1941 and again under date of September 21, 1944, petitioners received from the Treasury Department express rulings that the amounts paid for refreshment, merchandise and service by patrons in the Laramar Ballroom were not subject to the 20 per cent cabaret tax imposed by Section 1700(e) of the Internal Revenue Code and that the only tax applicable was the tax imposed on admissions to such ballrooms by Section 1700(a) of the Internal Revenue Code. (R. 97, 98, Pltfs.' Ex. J, R. 97, 164 and Pltfs.' Ex. K, R. 98, 164, 6) The first time the Treasury Department ever notified petitioners that sales of refreshments to patrons in the Laramar Ballroom were subject to the 20% cabaret tax imposed by Section 1700 (e) was shortly after December 2, 1948. (R. 98, 99)

Seventeen other ballrooms located in nine different states and having the same physical characteristics and pattern of operation as petitioners' ballroom (R. 36, 37, 59-62, 74, 85-88, 91, Pltfs.' Ex. Q, R. 174, 13, 128) also received express rulings from the Treasury Department between the dates of December 18, 1942 and September 3, 1947, that they were not subject to the cabaret tax imposed by Section 1700(e) of the Internal Revenue Code as amended but were subject to only the general admissions tax imposed by Section 1700(a) of such code. The names of these ballrooms, their location, the dates of the Treasury's letters containing such

rulings, and the exhibit numbers of said letters are as follows:

Name	Location	Date of Treasury's Letter	Pltfs.' Exhibit No.
Turnpike Casino	Lincoln, Neb.	Dec. 18, 1942 and Sept. 18, 1943	U, R. 178, 129 and V, R. 179 and 129
Danceland	Cedar Rapids, Ia.	Sept. 15, 1944	E*
Aragon	Chicago, Ill.	Sept. 15, 1944 and Sept. 26, 1944	B, R. 161, 20, 52, 55 and C, R. 161, 55, 56
Trianon	Chicago, Ill.	Sept. 15, 1944 and Sept. 26, 1944	B, R. 161, 20, 52, 55 and D, R. 162, 56
Surf	Clear Lake, Ia.	Oct. 12, 1944	W, R. 180, 130
Terp	Austin, Minn.	Oct. 12, 1944	W, R. 180, 130
Nightingale	Appleton, Wis.	Oct. 13, 1944 and Nov. 4, 1944	S, R. 175, 128 and R, R. 175, 128
Tromar	Des Moines, Ia.	Oct. 28, 1944	E, R. 162, 19, 83
Val-Air	Des Moines, Ia.	Oct. 28, 1944	E, R. 162, 19, 83
Skylon	Sioux City, Ia.	Oct. 28, 1944	E, R. 162, 19, 83
Shore Acres	Sioux City, Ia.	Oct. 28, 1944	E, R. 162, 19, 83
Chermot	Omaha, Neb.	Oct. 28, 1944	E, R. 162, 19, 83
Arkota	Sioux Falls, S. Dak	Oct. 28, 1944	E, R. 162, 19, 83
Frog-Hop	St. Joseph, Mo.	Oct. 28, 1944	E, R. 162, 19, 83
Indiana Roof	Indianapolis, Ind.	March 6, 1947	Q, R. 174, 13, 128
Centennial Terrace	Sylvania, Ohio	July 2, 1947	T, R. 177, 129
Roof Garden	Arnolds Park, Ia.	Sept. 3, 1947	X, R. 180, 130, 131

*Attached to Pltfs.' Amendment to Complaint (R. 16, 17) and admitted by Defts.' Answer. (R. 25)

One operator testified that since 1919 he had been owning and operating ballrooms in which soft drinks, popcorn and candy bars were sold (R. 80, 87) and that the first date on which he was ever notified that he should be paying a tax under Section 1700(e) on the sale of these items was on December 2, 1948(R. 89, 90); that prior to that date he paid only the admissions tax imposed by Section 1700(a) on the general admission charges to his ballrooms. (R. 88, 89, 90) Another operator testified that a partnership of which he was a member, from 1933 to December 1946, owned ballrooms in which soft drinks, popcorn, candy bars, gum and 3.2 beer were sold (R. 71, 75) and that the only tax the partnership ever paid was the regular admissions tax which he described as "the same tax that a theater col-

lects." (R. 75) He was never notified to pay a cabaret tax and the only communication he ever received from the Treasury Department notified him just to the contrary. (R. 75)

The Aragon and Trianon Ballrooms which are the largest ballrooms in the world (R. 48), have never paid the cabaret tax on their sales of refreshment and merchandise but only the general admission tax on their admissions. (R. 49) Up to and including the date of the trial, neither ballroom had ever been notified by the Treasury Department that its sales of refreshment and merchandise were subject to the cabaret tax imposed by Section 1700(e) of the Internal Revenue Code. (R. 57)

The Prom Ballroom of St. Paul, Minnesota, the Terp Ballroom of Austin, Minnesota and the Blue Moon Ballroom of Wichita, Kansas, are other ballrooms which up to and including the date of trial had not been notified by the Treasury Department that they should be paying the cabaret tax on their sales of refreshment and merchandise. (R. 57-59) These three ballrooms have the same physical characteristics and pattern of operation as petitioners' ballroom. (R. 59-61, 74)

The facts stated above are undisputed in the record. From these undisputed facts and by reason of the government's failure to contradict the same, only one inference can be drawn therefrom, namely, that the Treasury Department, prior to December 2, 1948, uniformly and consistently held that ballrooms of the type and kind operated by petitioners were not taxable as a "roof garden, cabaret, or other similar place" under Section 1700(e) of the Internal Revenue Code, as amended.

The amount of cabaret tax for which recovery in this action is sought was paid by petitioners on December 13, 1948, to E. H. Birmingham, the then Collector of Internal Revenue, and petitioners' claim for refund of such tax, filed

with said collector on that same date, was denied by the Treasury Department. (R. 2, 3)

The District Court, after a thorough and exhaustive opinion (R. 198-278) in which it gave careful consideration to all the rules of statutory construction applicable to Section 1700(e) of the Internal Revenue Code as amended (R. 265), found, in its Finding No. 16, that "it was not the will and intent of Congress that receipts from ballrooms of the type and kind operated by the plaintiffs were to be subject to the tax imposed by Section 1700(e)" (R. 285), and accordingly, entered judgment in favor of petitioners.(R. 286)

The Court of Appeals, after announcing the rule that it would not be justified in refusing to follow the decision of the United State Court of Appeals in the case of *Avalon Amusement Corporation v. United States,* 165 F. 2d 653 (C.C.A. 7th) unless convinced that it was clearly wrong (R. 295) found no sufficient reason to decline to recognize such decision as a precedent directly applicable to the facts of this case, and accordingly, held that Congress did intend that gross receipts of ballrooms such as petitioners from admissions, soft drinks, chewing gum, candy bars, cigarettes and check room service should be subject to the tax imposed by Section 1700(e) of the Internal Revenue Code, as amended. (R. 297) It therefore found the judgment of the District Court erroneous and reversed the same. (R. 300)

E. H. Birmingham having died on November 18, 1950, his personal representatives were, by appropriate proceedings in the Court of Appeals, substituted as parties appellant in that Court. (R. 304)

JURISDICTION.

The judgment of the United States Court of Appeals was entered November 10, 1950. (R. 300) The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, Section 1, 62 Stat. 928, 28 U.S.C., Section 1254.

STATUTES AND REGULATIONS INVOLVED.

Section 1700(e) of the Internal Revenue Code, as amended by Section 542 of the Revenue Act of 1941, c. 412, 55 Stat. 711, Section 622 of the Revenue Act of 1942, c. 619, 56 Stat. 981, and Section 3 of Act of June 9, 1944, c. 240, 58 Stat. 273, together with the pertinent provisions of the regulations issued thereunder, are set forth in Appendix A, infra, pp. 75 and 76.

QUESTIONS PRESENTED.

1. Whether Congress intended to subject the receipts of ballrooms of the type and kind operated by petitioners to the tax imposed by Section 1700(e) of the Internal Revenue Code, as amended, instead of Section 1700(a) of such code?

2. Did the Court of Appeals, in construing Section 1700 (e) of the Internal Revenue Code, as amended, and particularly the definition contained therein of a "roof garden, cabaret, or other similar place", err in failing to apply all the applicable rules of statutory construction?

3. Did the Court of Appeals err in holding that the legislative history of Section 1700(e) of the Internal Revenue Code, as amended, shows that Congress intended to include ballrooms of the type and kind operated by petitioners within the definition of a "roof garden, cabaret, or other similar place" contained in said section?

4. Section 1700(e) of the Internal Revenue Code, as

amended, being ambiguous and Section 101.14 of Treasury Regulations 43 being in substance a restatement of said section and, therefore, equally ambiguous, did the Court of Appeals err in attaching great weight to such regulation in its interpretation of said section?

5. Section 101.14 of Treasury Regulations 43 being in substance a restatement of Section 1700(e) of the Internal Revenue Code, as amended, did the Court of Appeals err in failing to consider the continuous, uniform and undeviating interpretation which the Treasury Department had placed on said regulation in actual practice, which interpretation is in direct conflict with the construction placed on such regulation and statute by the Court of Appeals?

6. In view of the fact that the Committee of Congress in which the Revenue Act of 1942 originated expressly stated that the objective of such act was to increase taxes, did the Court of Appeals enter the realm of speculation in holding that Congress "may" have intended by said enactment to reduce the amusement tax on ballrooms for some reason or purpose not appearing in either the report or the statute itself?

7. Did the Court of Appeals err in holding that a "public performance" was furnished at petitioners' ballroom when the record shows that no patron goes there to watch dancing or any exhibition by others but goes there simply to dance for his or her own enjoyment?

8. Did the Court of Appeals substitute its findings of fact for those of the District Court supported by substantial evidence on the question of whether cabarets and roof gardens on the one hand and ballrooms on the other are separate, distinct and dissimilar establishments.

9. Did the Court of Appeals in construing Section 1700 (e) of the Internal Revenue Code, as amended, misapply the rule that a statute will be construed so as to avoid absurd or unreasonable results?

10. Did the Court of Appeals err in holding that it would not be justified in refusing to follow the decision of the Court of Appeals for the Seventh Circuit in the case of *Avalon Amusement Corp. v. United States*, 165 F. 2d. 653, "unless convinced that it was clearly wrong"?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

In This Case the Court of Appeals Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question presented involves a determination of whether Congress intended to subject the receipts of ballrooms of the type and kind operated by petitioners from sales of refreshments, merchandise and check room service to the so-called 20 per cent cabaret tax imposed by Section 1700(e) of the Internal Revenue Code, as amended, rather than to subject the receipts of such ballrooms from admission charges to the tax imposed by Section 1700(a) of such code.

The undisputed record in this case reveals that there are thousands of persons throughout this country who are engaged in providing but one form of recreation to the public, i.e., dancing at low cost in ballrooms of the same type and kind as petitioners. (R. 69) The providing of such form of recreation is a business in itself separate and distinct from all other businesses in the entertainment field and is so regarded by those who are primarly connected with that field, such as the American Federation of Musicians (R. 31), the American Society of Composers, Authors and Publishers (R. 45), the nation's largest amusement

weekly (R. 140, 144), and orchestra booking agencies. (R. 121)

Since the determination of the question of federal law stated above will thus affect one entire industry of this nation and the thousands of persons engaged therein, it is obviously an exceedingly important one.

The question is also important from the standpoint of the great amount of tax involved and the effect which its determination will have on the amusement tax burden of the ballroom operators of this country. If these operators are subject to the tax imposed by Section 1700 (a) of the Internal Revenue Code, they need pay only a general admissions tax equal to 20% of their box office admission charges, the same as owners of skating rinks, movie theaters, sports arenas, circuses, carnivals and amusement parks. If, on the other hand, they are subject to the tax imposed by Section 1700(e) of the Internal Revenue Code, as decided by the Court of Appeals in this case, then they must pay a 20% cabaret tax not only on their admission charges but also on their sales of soft drinks, popcorn, gum, candy, cigarettes and check room service. The undisputed record shows that such sales account for one-third of a ballroom's total receipts. (R. 61, 77) Petitioners submit that a question which thus involves the determination of whether a tax of 20% shall be imposed on one-third of the gross receipts from an entire industry in this country is of sufficient importance to warrant this court granting certiorari for the purpose of deciding the same.

Two other reasons, in addition to the large number of persons affected and the great amount of tax involved, require that the question presented should be settled by this court. The first reason is that a decision by this court will put an end to an administrative policy of the Treasury Department which has been so wholly contradictory and utterly lacking in uniformity that the thousands of ballroom

operators who today operate ballrooms in this country do not know whether they should be paying a 20% cabaret tax on their total receipts under Section 1700 (e) of the Internal Revenue Code, as amended, or a 20% admission tax on only their admission charges under Section 1700 (a) of such code. The record shows that as early as 1919 and continuously down to December 2, 1948, the Treasury Department consistently took the position that ballrooms wherein refreshments and merchandise were sold were not subject to the so-called cabaret tax imposed by said Section 1700 (e) but were subject to only the admission tax imposed on their admission charges by said Section 1700 (a). (R. 49, 71, 75, 80, 89) The record shows that even after the 1942 amendment which the Treasury Department now contends, and the Court of Appeals held, changed the law, the Treasury Department expressly ruled on twelve separate and distinct occasions, commencing as early as December 18, 1942 and continuing as late as September 3, 1947, that ballrooms of the same kind and character as petitioners' ballroom (R. 36, 37, 59-62, 74, 85-88, 91, Pltfs.' Ex. Q. R. 174, 13, 128) were not subject to the cabaret tax imposed by Section 1700 (e), as amended by said amendment, but were subject to the general admissions tax imposed by Section 1700 (a), as amended by the same amendment. There were eighteen ballrooms, located in nine different states, that received such rulings. The names of the seventeen ballrooms other than petitioners' ballroom, their location, the dates of the Treasury's letters containing such rulings and the exhibit numbers of such letters are all set out in the schedule on page 10 of this petition.

That ballrooms of the type and kind operated by petitioners were, at the instance of the Treasury Department being taxed under Section 1700 (a) instead of Section 1700 (e), after the 1942 Amendment, is further shown by the case of *United States v. Covey Gas & Oil*, 171 F. 2d 213 (C.C.A. 10,

1948), wherein the government successfully contended that taxpayer's ballroom, during period from September 1, 1942 through July 31, 1944, was subject to a Treasury Regulation issued pursuant to Section 1700 (a) which taxed thereunder reduced admission charges for women at the same rate as that imposed on the established price of admission to other persons.

The record further shows that, although the petitioners have operated the Laramar Ballroom since 1938, it was not until shortly after December 2, 1948 that they were ever notified that sales of refreshments to patrons in the Laramar Ballrooms were subject to the 20% cabaret tax imposed by Section 1700 (e) of the Internal Revenue Code as amended. (R. 98, 99) Prior to that date they had twice been expressly advised—once under date of December 20, 1941, and again under date of September 21, 1944—that such sales were not subject to said tax and that the only tax applicable was the tax imposed on admissions to such ballroom by Section 1700 (a) of the Internal Revenue Code. (R. 97, 98, Pltfs.' Ex. J, R. 97, 164 and Pltfs.' Ex. K, R. 98, 164, 6) The record further shows that even after December 2, 1948 and up to and including December 1, 1949, the date of trial, ballrooms in Illinois, Minnesota and Kansas, having the same physical characteristics and pattern of operation as petitioners' ballroom, were not being subjected to the 20% cabaret tax imposed by Section 1700 (e) as amended. (R. 57-61, 74)

In the light of the foregoing record regarding Treasury Department policy in applying the cabaret tax and admissions tax to ballrooms, is it any wonder that the ballroom operators of this nation are confused and uncertain as to whether they should be paying the cabaret tax under Section 1700 (e) or the admissions tax under Section 1700 (a)? This court should end this confusion and uncertainty.

The other additional reason the question presented

should be settled by this court is that the decisions of the Court of Appeals for the Eighth Circuit in this case and the Court of Appeals for the Seventh Circuit in the *Avalon Amusement Corp. v. United States,* 165 F. 2d 653, are controlling only in those two circuits and leave the question undetermined in the eight remaining circuits. Because of the tremendous impact of a 20% cabaret tax on a ballroom operator's entire gross receipts, most ballroom operators in these circuits will have no alternative but to attempt to avoid such impact by actions in federal district courts contesting the tax. Because such courts are not bound by the decisions of Courts of Appeals for Circuits other than their own *(Mast, Foos & Co. v. Stover Mfg. Co.,* 177 U.S. 485, 488, 20 S. Ct. 708, 44 L. Ed. 856) and because they may not even accord the decision in the *Avalon* case persuasive weight for the reasons stated by the District Court in this case (R. 275-276), the question herein presented is likely to be extensively litigated for years to come. This court should prevent such likelihood by settling the question once and for all by granting certiorari in this case.

II.

The Decision of the Court of Appeals in This Case Decides a Federal Question in a Way Probably in Conflict With the Applicable Decisions of This Court.

This case involves the determination of the meaning of a federal statute which the Court of Appeals found was ambiguous. (R. 296) This court, in *United States v. Dickerson,* 310 U.S. 554, 562, 60 S. Ct. 1034, 84 L. Ed. 1356, held that "the meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction." The failure of the court below in that case to apply this cardinal rule caused this court

to reverse its judgment. The rule is also sustained by the decision of this court in *United States v. Fisher*, 2 Cranch (U.S.) 358, 386, 2 L. Ed. 304, 313.

The court below in the present case construed Section 1700 (e) of the Internal Revenue Code as amended without giving any consideration whatever to three rules of construction which, under decisions of this court hereinafter cited, were relevant and applicable to such statute and which, if applied, would have revealed an intent on the part of Congress in adopting the same contrary to that found by the Court of Appeals but in accord with the intent found by the District Court. A reading of the opinion of the latter court shows that it considered and weighed every applicable rule for the construction of Section 1700 (e) as amended, and among such rules were two of the rules hereinafter mentioned. The facts making the third rule operative in the present case were not then in existence.

The three rules in question and their relevancy in construing Section 1700 (e) as amended are now considered.

A.

Rule That Intent of Congress is to be Arrived at by Considering the Purposes of the Statute and Circumstances Under Which it Was Enacted.

This court is firmly committed to the rule that the meaning of words in a statute is to be arrived at by a consideration of not only the words themselves but also the purposes of the law and the circumstances under which the words were employed. *Vermilya-Brown Co.*, 335 U.S. 377, 386, 69 S. Ct. 140, 93 L. Ed. 76; *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258, 58 S. Ct. 167, 82 L. Ed. 235; *Smith v. Townsend*, 148 U.S. 490, 494, 13 S. Ct. 634, 37 L. Ed. 533.

The opinion of the Court of Appeals reveals that it

gave no consideration whatever to the object of the 1942 Amendment to Section 1700 (e) of the Internal Revenue Code and the circumstances which prompted its enactment. Had that court done so it would have discovered that the purpose of Congress in passing such amendment was not to take ballrooms out from Section 1700 (a) where they had been taxed for more than thirty years and place them under Section 1700 (e) but was to close a "loop-hole" in the latter statute through which hotel dining rooms of the type involved in the cases of *United States v. Broadmoor Hotel Co.*, 30 F. 2d 440, and *Busey v. Deshler Hotel Co.*, 130 F. 2d 187 (C.C.A. 6th) were able to escape entirely the payment of any amusement tax. The report of the Senate Finance Committee (Senate Report No. 1631, 77 Cong. 2d Session) accompanying said amendment, when analyzed in the light of existing Treasury regulations and the holding of the court in each of those cases, makes the foregoing fact inescapably clear. That report states the purpose of the amendment, as follows:

> "In order to allay possible questions under the present statute, the amendment specifies that the tax levied on amounts paid by or for any patron or guest entitled to be present during any portion of the performance, shall be applicable although no increase is made in the charges for admission, refreshment, service, or merchandise by reason of the furnishing of the performance. Thus the tax will be collected although a cabaret does not increase its prices for food or beverages while its floor show is in progress. The amendment confirms the Treasury Department's interpretation of the present statute by stating that the tax is applicable in the case of any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise." 1942-2 Cum. Bulletin 504, 700.

The same explanation appears in the Conference Committee's report issued in conjunction with the Revenue Act of 1942 H. Conf. Rep. No. 2586, 77 Cong. 2d Session, p. 79, 1942-2 Cum. Bull. 701, 732.

The "Treasury Department's interpretation of the present statute" referred to by the Senate Committee and the Conference Committee is unmistakably identified by the preceding sentence appearing in the report of each of those Committees, namely: "Thus, the tax will be collected although a cabaret does not increase its prices for food or beverage while its floor show is in progress." This statement shows first of all that it is an interpretation dealing only with cabarets since that is the only establishment mentioned, and second, it shows from the situation described that the interpretation dealing with cabarets which the amendment seeks to confirm is the interpretation which the Treasury Department in its regulations had unsuccessfully tried, in the cases of *United States v. Broadmoor Hotel Co.*, 30 F. 2d 440, and *Deshler Hotel Co. v. Busey*, 36 F. Supp. 392, to impose on hotel dining rooms wherein music and dancing were furnished in connection with the serving of food, and no admission fee was imposed, either directly by a separate charge, or indirectly by including the charge for such music and dancing privileges in the price of the food. At the time the 1942 Amendment was being considered by the Senate (Senate Report No. 1631 dated October 2, 1942) the decision of the Sixth Circuit Court of Appeals affirming the judgment of the District Court in the last mentioned case had been handed down for nearly three months. *Busey v. Deshler Hotel Co.*, 130 F. 2d 187 (C.C.A. 6th, July 8, 1942). As the District Court, in its opinion (R. 236) pointed out regarding this case, "The forceful language used by the United States Court of Appeals for the Sixth Circuit and rather broad scope of its holding in affirming the decision of the lower court in the *Deshler* case appar-

ently convinced the Senate Committee on Finance, however, that there was a serious doubt whether the Treasury's interpretation of Section 1700 (e), as contained in its regulations under the 1941 Amendment to said Section 1700 (e), would be given any effect in a subsequent hotel dining room case similar to the *Deshler* case."

Justification for this doubt is to be found in three district court decisions all holding that the tax imposed by Section 1700 (e) as amended by the 1941 Act did not apply to an establishment which made no admission charge and its price for food and refreshment remained the same regardless of whether entertainment was furnished. *Schuster's Wholesale Produce Co. v. United States,* 49 F. Supp. 909 (W. D. La.), *Kentucky Hotel Inc. v. Glenn* (W. D. Ky.), C.C.H. (1944) Par. 9349, 33 A.F.T.R. 1654, and *Sir Francis Drake Hotel Co. v. United States,* 75 F. Supp. 668 (N.D. Cal.). In each of these three cases, two of which involved hotel dining rooms, the court rejected the Treasury Department's interpretation of the 1941 Amendment.

With the amusement tax free situation disclosed by these three cases, the meaning of the language used in the Reports of the Senate Finance Committee and the Conference Committee becomes abundantly clear. It was to take care of just such a situation that the 1942 Amendment was adopted. The District Court in its opinion so held. (R. 236-241)

B.

Rule That Where, After the Enactment of a Statute By Congress, the Committee in Which Such Statute Originated Makes a Formal Statement of the Meaning of the Words Used Therein, Such Statement is Virtually Conclusive of the Meaning to be Placed on Said Words.

The rule of statutory construction stated above was expressly recognized and applied by this court in the case of *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329, 330, 62 S. Ct. 1095, 86 L. Ed. 1501, in holding that a statement by the Committee of Congress, which had originally reported the general Allotment Act of 1887, made within five years after its passage, was virtually conclusive as to the meaning of that enactment.

The relevancy of this rule as an aid in construing Section 1700 (e) as amended is conclusively established by the following uncontroverted facts, all of which were called to the attention of the Court of Appeals in petitioners' brief filed with that court. On June 29, 1950, the House of Representatives passed a bill known as H. R. 8920, (Congressional Record, Pages 9618-19, June 29, 1950) which in its enacting clause states "This act * * * may be cited as the 'Revenue Act of 1950'". Section 125 (b) of this Act provides:

> "BALLROOMS AND DANCE HALLS.—Section 1700 (e) (1) (relating to tax on cabarets, roof gardens, etc.) is hereby amended by inserting after the second sentence thereof the following new sentence: 'In no case shall such term include any ballroom, dance hall or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the ap-

plication of the preceding sentence, as a "roof garden, cabaret or other similar place".'"

The purpose of this amendment is clearly and emphatically stated by the Committee on Ways and Means of the House in House Report No. 2319, at pp. 71 and 72, as follows:

> "This section also amends Section 1700 (e) (1) of the code to exempt from the cabaret tax bona fide dance halls, ballrooms, and other similar places where the serving or selling of food, refreshment or merchandise is merely incidental to the music and dancing privileges furnished unless the conduct of the place is such as to bring it within the normal concept of a roof garden, cabaret or similar place. This determination will be made by reference to the over-all operation of the establishment, including such factors as the relative income from the several activities over a period of time, the relative portion of space devoted to the various activities, the type of refreshments served or sold, the scope and character of the entertainment furnished, and the hours of operations.
>
> "The purpose of this amendment is to make it clear that the principles set forth in the case of Geer v. Birmingham, collector of internal revenue, United States District Court, Northern District of Iowa, decided January 10, 1950, are controlling in the determination of whether the establishment involved is operating as a cabaret or as a dance hall, and to avoid the broad construction placed upon the statute in the case of Avalon Amusement Corporation v. United States, (165 Fed. 2d 653) which requires that dance halls and similar establishments be taxed as cabarets, even though the serving or selling of food, refreshments, or merchandise is merely incidental."

After H. R. 8920 passed the House, it went to the Senate and was referred to the Finance Committee where it was

being considered at the time war broke out in Korea. According to an article by John D. Morris appearing on page 1 of the July 14, 1950 issue of the New York Times, the measure was shelved indefinitely by such Committee "at the Administration's request" because of this Korean War situation.

The fact that H. R. 8920 did not become law in no way detracts from the decisive significance of the aforesaid Report of the Committee on Ways and Means of the House with respect to the meaning which the 77th Congress had when it inserted in the Revenue Act of 1942 its definition of the term "roof garden, cabaret, or other similar place." Here in 1950, the Committee on Ways and Means of the House, being the same committee (H.R. Report No. 2333, C.B. 1942-2, p. 372) in which the Revenue Act of 1942 originated, had occasion to report to the House the broad and sweeping interpretation which the Secretary of the Treasury was now placing upon such definition. It is crystal clear from this report it was never intended that ballrooms, dance halls and other similar places where the serving and selling of food and refreshments was merely "incidental" to the music and dancing privileges furnished were within the purview of the definition contained in Section 1700 (e) unless the conduct of the place was otherwise such as to bring it within the normal concept of a roof garden, cabaret, or other similar place.

Notwithstanding the fact that petitioners in their brief filed with the court below urged the application of this court's rule in the *Sioux Indian Tribe* case to the foregoing facts, the opinion of the Court of Appeals makes no mention whatever of said rule. This being true, there was necessarily no "considered weighing" of that "relevant aid to construction" by that court as required by this court's decision in *United States v. Dickerson*, supra.

C.

Rule of Ejusdem Generis.

Another rule of statutory construction which the District Court considered at length (R. 266-272) but which the Court of Appeals did not even mention is the so-called rule of ejusdem generis. This court utilized the rule to determine the coverage of tax statutes in the cases of *F. W. Fitch Co. v. United States*, 323 U.S. 582, 585, 586, 65 S. Ct. 409, 89 L. Ed. 472, and *White v. Aronson*, 302 U.S. 16, 20, 58 S. Ct. 95, 82 L. Ed. 20.

The rule is relevant in the present case because as the District Court in its opinion (R. 271) pointed out, the words "roof garden" and "cabaret" as they appear in Section 1700 (c) of the Internal Revenue Code as amended and in paragraph (a) of Section 101.14 of the Treasury Regulations are followed by the words "other similar place". That court then proceeded to hold that "in the situation thus presented the maxim of noscitur sociis and more particularly the specific application of that maxim in the rule of ejusdem generis would be applicable." (R. 272)

Petitioners submit that the failure of Court of Appeals to give "considered weighing" to this third "relevant aid to construction" was contrary to this court's decision in *United States v. Dickerson*, supra.

III.

The Court of Appeals Has Erroneously So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Petitioners submit that the Court of Appeals in its opinion twice erroneously so far departed from the accepted

and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. In the first instance, said court substituted its findings of fact for those of the District Court supported by substantial evidence on the question of whether cabarets and roof gardens on the one hand and ballrooms on the other are separate, distinct and dissimilar establishments.

The District Court in its Finding No. 15 found that "cabarets and roof gardens are types of establishments which are separate, distinct and dissimilar from ballrooms of the type and kind operated by the plaintiffs." (R. 285) In Finding No. 13 the court also found that "the primary purpose of those attending a ballroom is to dance. Only a small percentage of cabaret patrons do make use of the dancing privileges afforded. Cabaret patrons usually and generally patronize such establishments for purposes other than dancing, such purposes being to see the floor show, to entertain guests, and to partake of food and drink." (R. 284) Notwithstanding the fact, as stated by the Court of Appeals (R. 291, 292), that the collector did not claim that the District Court "erred in its findings describing the operations or the differences between cabarets and ballrooms," the court below upset the above quoted findings of the District Court and instead made its own findings as follows: "Though each point of dissimilarity between dance halls and cabarets has been noted, the points of similarity are more conspicuous. Both provide dancing facilities for and sell refreshments to their patrons. Whereas one caters to lavish spenders and makes the dancing privilege a mere incident to the charge for refreshment, the patrons of the other pay directly for the dancing privileges and incidentally spend frugally for refreshment. The business of both is to provide public performances with dancing." (R. 299)

The undisputed record testimony of disinterested persons from important branches of the entertainment in-

dustry abundantly supports the findings of the District Court and squarely contradicts the findings of the Court of Appeals on the particular question. That testimony, which is summarized on pages 5 to 8 of this petition, establishes that a cabaret differs from a ballroom in all of the following essential characteristics, to wit: A cabaret seats all of its patrons whereas a ballroom seats only a small percentage of its patrons; a cabaret has an exceedingly small dancing area whereas a ballroom has an exceedingly large dancing area; the dance music in a cabaret is intermittent and of short duration whereas the dance music in a ballroom is continuous with only one or two short intermissions; a cabaret has a floor show and sells food and liquor whereas a ballroom has no floor show, sells no food and usually sells no liquor; the prices charged by a cabaret for soft drinks, popcorn, candy, gum and cigarettes greatly exceed the prices charged for such items by ordinary retail outlets whereas the prices charged for these same items by a ballroom do not; the greater part of the receipts of a cabaret are derived from sales of food and drink whereas the greater part of the receipts of a ballroom are derived from the sale of admission tickets for dancing privileges; a cabaret in its advertising stresses food, liquor and floor show entertainment, while a ballroom in its advertising mentions only dancing. That the foregoing points of dissimilarity between a cabaret and a ballroom are more conspicuous than points of similarity is conclusively shown by the fact that the former are recognized and regarded by the American Society of Composers, Authors and Publishers and the American Federation of Musicians as the basis for classifying each establishment in a separate category for business purposes of each of those organizations. (R. 31-34, 41-44)

Said points of dissimilarity in their aggregate demonstrate that the business of a cabaret is to provide a place which people usually and generally patronize for purposes

other than dancing, such as to partake of food and alcoholic liquors and see a floor show (R. 146) and that the business of a ball room is to provide a place for people to engage solely in one form or recreation, i.e., dancing. (R. 69, 107, 149) This being true, the finding of the Court of Appeals that "the business of both is to provide public performances with dancing" is not supported by the record and is contrary to the record.

This court has repeatedly held that a Court of Appeals is without authority to substitute its findings of fact for those of the trial court supported by substantial evidence *McCaughn v. Real Estate Land, Title & T. Co.*, 297 U.S. 606, 608, 56 S. Ct. 604, 80 L. Ed. 879, and *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 407, 54 S. Ct. 443, 78 L. Ed. 859.

For the reasons above stated, it is obvious that Court of Appeals in the present case infringed this rule and exceeded its power as an appellate court. The infringement was highly prejudicial to petitioners for the reason that had that court accepted the trial court's findings No. 13 and 15 above referred to, it could not have held, as it did, that ballrooms of the type and kind operated by plaintiffs were places similar to a cabaret and therefore within the definition contained in Section 1700 (e) as amended.

The second instance wherein petitioner claims that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision was in its holding that in the interest of uniformity of decision among the circuits it "would not be justified in refusing to follow the decision of the Circuit Court of Appeals in the *Avalon* case unless convinced it was clearly wrong." (R. 295) Such holding was made at the very outset of its opinion before the court had made any independent investigation of the questions raised by the parties' briefs in the instant case and the law applicable thereto. In proceeding in this

manner, the court below in effect abdicated its function as an independent court of review with the result that petitioners "had two strikes against them" before the court ever came to consider the present case solely on its own merits.

That the rule of comity between the Courts of Appeal of the various circuits does not have such summary and commanding force as that attributed to it by the court below was made very clear by this court in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488, 489, 20 S. Ct. 708, 44 L. Ed. 856, when it approved the action of the Seventh Circuit Court of Appeals in refusing to follow a decision of the Eighth Circuit Court of Appeals, saying:

> "Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall

> be paid to the judgments of other co-ordinate tribunals."

Moreover, as the District Court pointed out, the present case involved the determination of several questions which were not raised in the *Avalon* case. This being true, the following further statement of this court in the *Stover Mfg. Co. case*, supra, was squarely applicable:

> "Comity, however, has no application to questions not considered by the prior court."

Finally, it should be noted that the court below in requiring petitioners to show that the decision in the *Avalon* case was "clearly wrong" put a greater burden on petitioners than that imposed by the three cases which the court cited in support of such requirement. In *United States v. Armature Rewinding Co.*, 124 F. 2d 589, 591, and *Grain Belt Supply Co. v. Commissioner*, 109 F. 2d 490, 492, the court held that it would not be justified in refusing to follow the opinion of another circuit court unless satisfied it was "erroneous", and in *United States v. Kelley*, 110 F. 2d 922, 924, the same court stated, "We should not refuse to follow the decision of the Fourth Circuit unless satisfied that it is wrong." The word "clearly" means "without uncertainty, beyond question or beyond a reasonable doubt". 14 C.J.S. 1200. Accordingly, the use of that word by the court below required petitioners to do more than show only that the decision in the *Avalon* case was erroneous. It required the petitioners to establish beyond question and a reasonable doubt that said decision was incorrect. In thus increasing the burden of petitioners beyond the requirement of its own decisions, the Court of Appeals, it is submitted, so far departed from the usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted this petition for writ of certiorari should be granted.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
LOUIS A. PARKER,
CHRISTOPHER T. BOLAND,
Attorneys for Petitioners.

GALLAGHER, OSHERMAN,
CONNOR AND BUTLER,
Of Counsel for Petitioners.

January, 1951.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The decision of the Court of Appeals, in construing Section 1700 (e) of the Internal Revenue Code, as amended, and particularly the definition contained therein of a "roof garden, cabaret, or other similar place", is in error in failing to apply all the applicable rules of statutory construction.

II.

The decision of the Court of Appeals is in error in holding that the legislative history of Section 1700 (e) of the Internal Revenue Code, as amended, shows that Congress intended to include ballrooms of the type and kind operated by petitioners within the definition of a "roof garden, cabaret, or other similar place" contained in said section.

III.

The decision of the Court of Appeals is in error in attaching persuasive weight to Section 101.14 of Treasury Regulations 43 in its interpretation of Section 1700 (e) of the Internal Revenue Code, as amended.

A.

Section 101.14 of Treasury Regulations 43, being in substance a restatement of said Section 1700 (e) which the Court of Appeals found was ambiguous, such regulation was equally ambiguous and, therefore, entitled to little weight in the interpretation of said statute.

B.

Section 101.14 of Regulations 43 being ambiguous, the continuous, uniform and undeviating interpretation which the Treasury Department had placed on said regulation in actual practice, was material to the meaning to be attributed to said regulation, and the decision of the Court of Appeals is, therefore, in error in ignoring such interpretation.

IV.

The Committee of Congress in which the Revenue Act of 1942 originated having expressly stated in its report that the object of such act was to increase taxes, and no contrary intent appearing in either the statute or said report, the Court of Appeals, in finding that Congress "may" have intended to reduce the amusement tax on ballrooms, entered the realm of speculation, and, in so doing, is in error.

V.

The decision of the Court of Appeals is in error in holding that petitioners' ballroom furnished a "public performance".

VI.

The District Court's finding of fact that petitioners' ballroom was an establishment "separate, distinct and dissimilar" from a roof garden and a cabaret was supported by substantial evidence, and the Court of Appeals is in error in making a substitute finding contrary thereto.

VII.

The Court of Appeals, in construing Section 1700 (e) of the Internal Revenue Code, as amended, misapplied the rule that a statute will be construed so as to avoid absurd or unreasonable results, and, in so doing, is in error.

VIII.

The decision of the Court of Appeals is in error in holding that it was required to follow the decision of the Court of Appeals for the Seventh Circuit in the case of *Avalon Amusement Corp. v. United States*, 165 F. 2d 653, unless convinced that it was clearly wrong.

ARGUMENT.

I.

The Decision of the Court of Appeals in Construing Section 1700 (e) of the Internal Revenue Code, as Amended, and Particularly the Definition Contained Therein of a "Roof Garden, Cabaret, or Other Similar Place", is in Error in Failing to Apply All the Applicable Rules of Statutory Construction.

The question which both the District Court and the Court of Appeals had to determine in the present case was whether Congress intended that the receipts from sales of refreshment, merchandise and checkroom service in ballrooms of the type and kind operated by petitioners should be subject to the tax imposed by Section 1700 (e) of the Internal Revenue Code, as amended. In answering this question, the District Court considered and applied what it referred to as the "apparently applicable rules"

(R. 265) for construing said statute, such rules being as follows: the rule that in absence of clear evidence to the contrary it is assumed that Congress intended the words used by it in a statute to have their well-known and well-recognized meanings (R. 266); the rule that a statute will be construed in the light of its legislative history and administrative background (R. 208-248, 277); the rule that courts will construe a statute in conformity with its general purpose (R. 266); and the rule of ejusdem generis (R. 266-272). The District Court also considered but refused to apply the so-called rule of executive construction (R. 249-261) and the rule of Congressional acquiescence. (R. 261)

In thus considering every "relevant aid to the construction of Section 1700 (e), as amended, the District Court acted squarely in accordance with the decisions of this court. *United States v. Dickerson*, 310 U.S. 554, 562, 60 S. Ct. 1034, 84 L. Ed. 1356; *United States v. American Trucking Associations*, 310 U.S. 534, 544, 60 S. Ct. 1059, 84 L. Ed. 1345; *United States v. Fisher*, 2 Cranch (U.S.) 358, 386, 2 L. Ed. 304, 313.

The Court of Appeals, although holding that Section 1700 (e), as amended, was ambiguous, did not consider, and, therefore, did not apply three rules of statutory construction as follows: the rule that the intent of Congress is to be arrived at by considering the purposes of the statute and the circumstances under which it was enacted, *Vermilya-Brown Co.*, 335 U.S. 377, 386, 69 S. Ct. 140, 93 L. Ed. 76; *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258, 58 S. Ct. 167, 82 L. Ed. 235; *Smith v. Townsend*, 148 U.S. 490, 494, 13 S. Ct. 634, 37 L. Ed. 533; the rule that where, after the enactment of a statute by Congress, the committee in which such statute originated makes a formal statement of the meaning of the words used therein, such statement is virtually conclusive of the meaning to be placed on said words, *Sioux*

Tribe of Indians v. United States, 316 U.S. 317, 329, 330, 62 S. Ct. 1095, 86 L. Ed. 1501; and the rule of ejusdem generis, *F. W. Fitch Co. v. United States*, 323 U.S. 582, 585, 586, 65 S. Ct. 409, 89 L. Ed. 472, and *White v. Aronson*, 302 U.S. 16, 20, 58 S. Ct. 95, 82 L. Ed 20.

The reasons for each of the above stated rules being a "relevant aid" to the construction of Section 1700 (e), as amended, are fully set forth on pages 20 to 27 of the petition for writ of certiorari and, accordingly, are not repeated here. The failure of the Court of Appeals to consider and apply each said rule was plainly error under the decisions of this court cited above in support of the same. The failure to consider and apply all three of the rules is also error under the decisions of this court in the *Dickerson*, *American Trucking Associations* and *Fisher* cases, supra.

II.

The Decision of the Court of Appeals is in Error In Holding That the Legislative History of Section 1700 (e) of the Internal Revenue Code, as Amended, Shows That Congress Intended to Include Ballrooms of the Type and Kind Operated by Petitioners Within the Definition of a "Roof Garden, Cabaret, or Other Similar Place" Contained in Said Section.

The importance of legislative history in the construction of a federal tax statute was clearly and emphatically stated by this court in *Harrison v. Northern Trust Company*, 317 U.S. 476, 479, 480, 63 S. Ct. 361, 87 L. Ed. 407. After pointing this out (R. 208), the District Court proceeded to devote that portion of its opinion which occupies forty pages of the printed record (R. 208-248) to a scholarly consideration of the legislative history of Section 1700 (e) of the Internal Revenue Code, as amended. Starting with the Revenue Act

of 1917, wherein Congress for the first time imposed an excise tax on various kinds of entertainment and continuing down to the present, the trial court traced every subsequent change made by Congress in such legislation and ascertained the purposes thereof from an examination of Congressional Committee hearings and reports, administrative regulations, rulings and practices and pertinent court decisions. As the result of this exhaustive study and thorough analysis of the legislative background of said Section 1700 (e), the District Court found that "it was not the will and intent of Congress that receipts from ballrooms of the type and kind operated by the plaintiffs were to be subject to the tax imposed by Section 1700 (e)." (R. 285)

The Court of Appeals rejected the aforesaid finding and held that Congress did intend, by Section 1700 (e), as amended, to tax petitioners' ballroom as a cabaret. From the court's opinion, however, it is impossible to say what facts in the legislative history of that statute impelled the court to make such a holding for the reason that the opinion contains no reference to Congressional hearings and reports, Treasury regulations, rulings and practices, pertinent court decisions and antecedent statutes other than the 1941 amendment.

Petitioners respectfully submit that from the undisputed facts hereinafter reviewed showing the legislative history of Section 1700 (e), as amended, only one reasonable inference can be drawn and that is that Congress, prior to the 1941 amendment, always taxed ballrooms under the general admissions tax provisions of Section 1700 (a), the same as skating rinks and theaters, and never taxed them under the cabaret tax provisions of said Section 1700 (e), and that the amendments of 1941 and 1942 to the latter section were not enacted with any intent of taking ballrooms out from under Section 1700 (a) and placing them under said Section 1700 (e), but were enacted solely for

the purpose of subjecting to a cabaret tax establishments generally similar to roof gardens and cabarets which had not been paying any admissions tax or cabaret tax and, therefore, had been operating free from any amusement tax whatever. In failing to make this inference, the Court of Appeals is in error warranting a review by this court and a reversal of its decision. The facts to which petitioners have reference are summarized in the following pages of this brief.

Legislative History Prior to 1941 Amendment.

In the Revenue Act of 1917 (40 Stat. 318), Congress, for the first time, imposed a tax upon entertainment of various kinds. This tax was in the nature of an admissions tax. See H. R. Report No. 45, 65th Cong., 1st Session, 1917, 8. Being an admissions tax, the Congress encountered little difficulty in imposing the tax upon those places of entertainment which normally made a direct admission charge to patrons attending the same. With respect to such places Section 700 (a) of the aforesaid act was squarely applicable, inasmuch as it imposed "a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place. . . ."

However, there existed at that time a category of entertainment known as "cabarets" which made no direct admission charge to the patrons but instead included the price of admission in the amounts charged such patrons for refreshments, service or merchandise. The difficulty of imposing an admission tax on this field of entertainment was clearly stated to the Senate Finance Committee by Mr. Ligon Johnson, representing The Theatrical Managers' Association, in Hearing and Briefs before the Committee on Finance, United States Senate, 65th Cong. 1st Session at page 385:

". . . The other point that I raise with relation to amusement taxes applies to the theaters' chief competitor, and the single interest that has done more to detract from the theatrical patronage than anything else in the United States, that is, the cabaret. The House Committee contemplated a tax on cabarets, as it says in its report: 'It is recommended that this tax be imposed on all places to which admission is charged, such as motion picture shows, theaters, circuses,' and so on.

"The trouble is that to the cabaret no admission fee is directly charged."

Apparently, as the result of its hearings, the Senate Finance Committee recommended the following changes in the House version of the Revenue Act of 1917:

"Your committee r e c o m m e n d e d the following amendments to Title VII of the House bill:

"First. Where admissions charged are in part or wholly included in the price paid for refreshments, service, or merchandise, the amount paid for such admission is to be computed under rules prescribed by the Commissioner of Internal Revenue, and a tax is proposed at the rate of 1 cent for each 10 cents paid for such refreshments, etc.

"The purpose of this amendment is to impose a tax upon admissions to what are commonly known as cabarets at the same rate as is imposed upon admissions to similar entertainments or amusements." Senate Report No. 103, 65 Cong. 1st Session, Aug. 4, 1917, 12.

Both houses of Congress agreed to this Senate Recommendation in the conference report contained in H. R. No. 172, 65th Cong. 1st Session, September 29, 1917, 17, 44, with the result that the Revenue Act of 1917, as enacted, provided in Section 700 (c) as follows:

"(c) a tax of 1 cent for each 10 cents or fraction thereof paid for admission to any public performance for profit at any cabaret or other similar entertainment to which the charge for admission is wholly or in part included in the price paid for refreshment, service or merchandise; the amount paid for such admission to be computed under rules prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, such tax to be paid by the person paying for such refreshment, service or merchandise."

T. D. 2603, promulgated December 4, 1917, by the Commissioner of Internal Revenue, in accordance with the authority contained in Section 700 (c) supra, established a formula for the computation of the "admissions" tax in the case of any "cabaret or other similar establishment" by providing in part:

"Twenty per cent of the amount paid for refreshments, merchandise, service, etc., including any sum paid for seats and tables reserved or occupied, at any public performance for profit at any cabaret or other similar entertainment, to which the charge for admission is wholly or in part included in the amount so paid, shall be regarded and deemed to be paid for admission to such performance."

The only change made in Section 700 (c) of the Revenue Act of 1917 by the Revenue Act of 1918 was the addition of the words "roof gardens" and the adoption of the formula contained in T. D. 2603. See Section 800 (a) (6) of Revenue Act of 1918, 40 Stat. 1120, 1121.

House Report 767, 65th Cong., 2d Session on H. R. 12863, issued in conjunction with the Revenue Act of 1918, in discussing the Revenue Act of 1917, refers to the "tax on admissions to roof gardens, cabarets, and other similar entertainments". This reference further establishes that in the

Revenue Act of 1917 the Congress had clearly in mind the definitive category in entertainment in which a tax was to be imposed upon admissions in those places where the price of admission was included, in whole or in part, in the price paid for refreshments, services or merchandise.

The pertinent provisions of Sections 800 (a) (1) and 800 (a) (6) of the Revenue Act of 1918 remained unchanged in subsequent revenue acts enacted between 1919 and 1938, both inclusive. They appear in the Revenue Act of 1926 as Sections 500 (a) (1) and 500 (a) (5) respectively, 44 Stat. 91. In 1939 the provisions of these two sections were incorporated into Sections 1700 (a) and 1700 (e) respectively of the Internal Revenue Code of 1939, 53 Stat. 862. Section 1700 (a) imposed "a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place", and Section 1700 (e) imposed a tax as follows:

> "A tax of 1½ cents for each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service or merchandise; the amount paid for such admission to be deemed 20 per centum of the amount paid for refreshment, service and merchandise."

No change was made in the foregoing provisions by the Revenue . ct of 1940, 54 Stat. 523.

The legislative history thus far reviewed shows clearly that Congress, in its various re-enactments of the provisions taxing the charges made by operators of cabarets, roof gardens and similar places to their patrons never departed from its original intent as expressed by the Senate Finance Committee in its report on the Revenue Act of 1917, "to impose a tax on admissions to what are commonly known as cabarets." The District Court in its Findings of Fact

specifically found that the words "cabaret" and "roof garden" in their well-known and commonly understood meaning and sense have not and do not include ballrooms of the type and kind operated by the petitioners. (R. 285)

Said legislative history further shows that the only establishments taxed under the provisions which Section 1700 (e) of the Internal Revenue Code of 1939 were "roof garden, cabaret or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service or merchandise". Since ballrooms of the type and kind operated by petitioners have always imposed a direct admission charge on their patrons (R. 42, 69, 72, 88, 96) and have never included an "admission charge" in their prices for refreshments and merchandise inasmuch as the undisputed record shows that such prices have never exceeded those charged for the same items at ordinary outlets, (R. 72, 86, 87, 100, 202), they could not possibly have been a "roof garden, cabaret or other similar entertainment" under the foregoing provision, and taxable as such. Instead the direct admissions charges of such ballrooms were taxable under the provisions incorporated in Section 1700 (a) of the Internal Revenue Code in the same manner as theaters, skating rinks, ball parks, etc. The Court of Appeals so held in its opinion statement that "ballrooms were consistently lumped together in the most general classification of unnamed 'places' to which admission was charged and taxed merely as such places." (R. 298)

1941 Amendment

In the Revenue Act of 1941 Congress, for the first time since 1918, made a material change in the language of the so-called "cabaret tax" provisions of prior enactments. This clearly appears from Section 542 (a) of the Revenue

Act of 1941 (55 Stat. 711) which changed the basis for computing the cabaret tax as follows:

> "(e) Tax on Cabarets, Roof Gardens, etc.—
>
> "(1) Rate.—A tax equivalent to 5 per centum of all amounts paid for admission, refreshment, service, and merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, if any payment, or part thereof, for admission, refreshment, service or merchandise, entitles the patron to be present during any portion of such performance. No tax shall be applicable under subsection (a) (1) on account of an amount paid with respect to which tax is imposed under this subsection.
>
> "(2) By whom paid.—The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments."

The purpose Congress had in mind in making the change embodied in the above quoted amendment appears in Paragraph 4 of Article V of House Report 1040, 77th Congress, 1st Session, as follows:

> "Under the existing law an attempt is made to segregate from the total charge made at cabarets, roof gardens and similar places of entertainment a portion attributable to a charge for admission where such charge is wholly or in part included in the patron's bill. This method of taxation has entailed serious administrative difficulties. To obviate these difficulties the bill makes the total charge the basis of the tax and applies to that base a rate of 5% in lieu of the existing rate of approximately 20% of the portion of the bill attributable to an admission charge."

Two things are apparent from the foregoing committee report. The first is that the method of taxation with which Congress was dealing in adopting the 1941 amendment to Section 1700 (e) was the method of taxing a charge for

admission at a cabaret, roof garden and other similar place of entertainment when such charge was wholly or partly included in the patron's total bill. Because ballrooms never have made an indirect charge for admission in this manner, but have always made a direct admission at a box office, (R. 42, 69, 72, 88, 96), the committee could not possibly have had reference to a method of taxing the admission charge of ballrooms.

The second thing apparent from the House Committee's report is that the method of taxation to which Congress' attention was directed was one which had entailed serious administrative difficulties. A portion of those difficulties were those which had arisen on account of the rather complex process of determining what portion of the charges made by a roof garden, cabaret or other similar entertainment could be fairly attributable to an "admission charge" and thus devising a method of taxing the same. This is apparent, not only from the language of that report already quoted above, but also from its statement on page 54 of said report that "under the present law the tax is imposed on the patron under a rather complicated rate of 2 cents (including the defense tax) for each 10 cents of 20 per cent of the amount paid if 20 per cent of the amount paid exceeds 50 cents."

An examination of two court decisions, *United States v. Broadmoor Hotel Co.*, 30 F. 2d 440 (Col.) and *Deshler Hotel Co. v. Busey*, 36 F. Supp. 392 (S.D. Ohio), make it readily apparent that the "serious administrative difficulties" mentioned in said House Committee report also referred to the unsuccessful attempts by the Treasury Department in those two cases to impose the cabaret tax on hotel dining rooms wherein music and dancing were furnished in connection with the serving of food and no admission fee was imposed, either directly by a separate charge, or indirectly by including the charge for such music and dancing privileges

in the price of the food. The effect of these two decisions was to relieve eating places operating in the manner just described from the payment of any amusement tax whatever inasmuch as they were also not taxable under Section 1700 (a) due to the fact that they made no direct admission charge.

Under the decision of this court in the case of *White v. Aronson*, 302 U.S. 16, 23, 58 S. Ct. 95, 82 L. Ed. 20, it is presumed that Congress had knowledge of the serious administrative difficulties which the Treasury had encountered in applying the cabaret tax to the dining room situation involved in the two above mentioned hotel cases and that, accordingly, they were "the serious administrative difficulties" the House Committee had reference to in its said report accompanying the 1941 amendment. This was the conclusion reached by the District Court in the present case (R. 228) and by the Louisiana federal district court in the case of *Schuster's Wholesale Produce Co.*, 49 F. Supp. 909.

Equally conclusive as showing that Congress did not have ballrooms in mind when it adopted the 1941 amendment to Section 1700 (e) is the extremely significant fact that the removal of ballrooms from the general admissions tax provisions of Section 1700 (a) and the placing of them under Section 1700 (e) would have resulted in a substantial reduction in the amusement taxes payable by ballrooms, something which would have been directly contrary to the then existing policy of Congress which, as shown by certain changes in tax rates made by said amendment, was to generally increase excise taxes in the entertainment field. For example, suppose while the 1941 Act was in effect, a ballroom's total receipts from its admission charges and refreshment and merchandise sales for one evening was $1,000. Inasmuch as the record shows that approximately two-thirds of a ballroom's gross receipts are derived from admission charges (R. 77, 106) and one-third of such

receipts are derived from sales of refreshment and merchandise (R. 61, 77), $666.67 of the foregoing amount would have consisted of direct admission charges and $333.33 would have consisted of gross receipts from sales of pop. popcorn, candy and similar items. The admissions tax imposed by Section 1700 (a) as amended by Section 541 (a) of the Revenue Act of 1941, 55 Stat. 710, was "1 cent for each 10 cents or fraction thereof of the amount paid for admission". Consequently, the tax payable under this section by said ballroom would have been 10% of $666.67 or $66.67. The cabaret tax imposed by Section 1700 (e) as amended by the 1941 Act was "5 per centum of all amounts payable for admission, refreshment, service or merchandise". Sec. 542 (a) of the Revenue Act of 1941, 55 Stat. 711. Accordingly, the tax payable by the ballroom in question would have been 5% of $1,000.00 or $50.00. Thus, it is seen that placing a ballroom under the said Section 1700 (e) would have produced $16.67 less tax than the amount payable, were it to remain under said Section 1700 (a).

The same result is equally apparent if the two tax rates in question are applied to the highest average amount paid per patrons for an evening spent at a ballroom, which, as the trial court found, was $1.68. (R. 284) Assuming, as one must from the record in this case already above referred to, that one-third of this amount or 56 cents was for purchases of refreshment and merchandise and the remaining $1.12 was for admission charge, the amount of admission tax payable under the 1941 Amendment would have been 12 cents and the amount of cabaret tax payable thereunder would have been 8 cents, a difference of 4 cents.

Petitioners submit that, in the absence of an explicit expression to the contrary, it would be wholly illogical to attribute to Congress an intent to thus reduce taxes by putting ballrooms under Section 1700 (e) when it is common knowledge that Congress in the fall of 1941 was firmly

committed to a policy of increasing taxes generally in order to defray the cost of a huge defense program. In furtherance of such policy Congress in the 1941 Act generally increased amusement taxes by (1) eliminating the exemption from admission tax previously granted admissions of 20 cents or less, (2) increasing permanently the tax on leases of boxes or seats in opera houses from 10 per cent to 11 per cent, (3) increasing the cabaret tax from 4 per cent of the total charge to 5 per cent thereof with no amount exempt from the tax, (4) removing the exemption previously enjoyed by religious, educational and charitable institutions, and (5) lowering the amounts of club dues, membership and initiation fees to which the tax applied, 55 Stat. 706, 710, 711.

To infer, as one must, from each of the foregoing changes in five specific provisions of the statute that Congress intended to increase amusement taxes and then infer, as the Court of Appeals did, from the change in a sixth provision of the same statute, that Congress intended in this one instance to lower amusement taxes is in this court's language "to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none". *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 394, 59 S. Ct. 516, 83 L. Ed. 784. As this court further remarked in that same case (306 U.S. 394):

> "A fair judgment of the statute in its entire setting relieves us from making such an imputation of caprice."

From the foregoing it clearly appears that Congress, in passing the 1941 amendment, did not intend to remove ballrooms from the tax status they had always occupied under Section 1700 (a), but meant only to place under Section 1700 (e) those establishments operating like the dining room involved in the *Deshler Hotel* case and thereby made

certain they would not escape the payment of any amusement tax whatever.

1942 Amendment.

Section 622 of the Revenue Act of 1942 (approved October 21, 1942, 56 Stat. 981) amended Section 1700 (e) of the Internal Revenue Code so as to make it read as it now appears (see Appendix A, p. 75) except the rate of the tax was 5 per cent instead of the present 20 per cent.*

By the 1942 amendment, Congress, for the first time, included in the cabaret tax statute a definition of "roof garden, cabaret, or other similar place". The Court of Appeals, in holding that this definition made ballrooms of the type and kind operated by petitioners taxable under Section 1700 (e), necessarily assumed that Congress, in adopting such definition intended to remove ballrooms from the tax imposed by Section 1700 (a), to which they had always theretofore been subjected and make them taxable under Section 1700 (e).

Petitioners contend that such assumption is wholly unwarranted because it imputes to Congress an intention to substantially reduce the taxes on charges made by ballrooms at the very time when this country was busily engaged in fighting a global war and Congress, faced with the necessity of increasing taxes with which to meet the unprecedented expenditures required by such a war, could not possibly have had thoughts of tax reduction in mind. Such thoughts would have been directly contrary to the policy of Congress in enacting the Revenue Act of 1942 as announced in the Report of the House Ways and Means Committee, No. 2333, which accompanied the bill for that Act as follows:

---

*Act Feb. 25, 1944, 58 Stat. 61, increased rate from 5 to 30 per cent. The latter rate was reduced to 20 per cent by Act June 9, 1944, 58 Stat. 273.

> "It is thus apparent that our revenue needs are extreme and your committee has endeavored to secure every dollar of additional revenue which, in its opinion, the national economy can bear." (C. B. 1942-2, p. 373)

In support of the foregoing contention, petitioners first point out that the Revenue Act of 1942 made no change in the general admission and cabaret tax rates imposed by the 1941 Act. The former tax rate remained at "1 cent for each 10 cents or fraction thereof of the amount paid for admissions." 26 U.S.C. Sec. 1700 (a). Likewise, the cabaret tax remained the same, i.e., "5 per centum of all amounts paid for admission, refreshment, service and merchandise." 26 U.S.C. Sec. 1700 (e). Consequently, for the reason stated earlier on pages 47 and 48 of this brief, a ballroom taxable under Section 1700 (e), as amended by the 1942 Act, on amounts charged for admission, food, refreshment and merchandise would pay considerable less tax than were it taxable solely on its admission charges under Section 1700 (a) as amended by said Act.

The lower tax rate which a ballroom would pay had it been taxable under the cabaret tax provisions of the 1942 amendment instead of the general admission tax provisions thereof is undoubtedly what prompted the operator of the Turnpike Casino Ballroom at Lincoln, Nebraska, on two different occasions after the adoption of the 1942 amendment and before the passage of the 1944 amendment increasing the cabaret tax rate, to request of the Treasury Department an express ruling making him taxable under Section 1700 (e) instead of Section 1700 (a). From the fact that each of these requests were summarily denied (Pltfs.' Ex. U, R. 178, 129 and Pltfs.' Ex. V, R. 179, 129) it may readily be inferred that the Treasury Department itself was fully aware of the loss of revenue which would result were

ballrooms such as the Turnpike Casino to be taxed as "roof garden, cabaret, or other similar place."

As stated on pages 21 to 23 of the petition for writ of certiorari, the real purpose of the 1942 amendment, and the one to which the Senate Committee had reference in its statement in Senate Report No. 1631, 77 Cong. 2d Session, that "the amendment confirms the Treasury Department's interpretation of the present statute", was to entirely close the "loop-hole" through which dining rooms of the type involved in the *Deshler Hotel* case, supra, were escaping the payment of any amusement tax. It was there pointed out that the decision of the Sixth Circuit Court of Appeals in *Busey v. Deshler Co.*, 130 F. 2d 187, had raised considerable doubt as to whether the language of the 1941 amendment was sufficient to warrant the broad Treasury regulations designed to accomplish said purpose. Petitioners submit that Congress could not have been so inconsistent as to intend by the 1942 amendment to remove said "loop-hole" from the law on the one hand, and at the same time, by the very same enactment create a new one which would enable hundreds of ballrooms to enjoy a substantial reduction in their amusement taxes.

It should here be noted that the Senate Committee's statement that the amendment "confirms the Treasury Department's interpretation of the statute" could not possibly have had reference to any interpretation of the Treasury applying Section 1700 (e) to ballrooms of the type and kind operated by petitioners for the reason that the undisputed record shows that the Treasury Department during the period between the passage of the 1941 amendment and the passage of the 1942 amendment did not interpret said section or any of its regulations promulgated thereunder as being applicable to such ballrooms. (Pltfs.' Ex. J, R. 97, 98, 164, 5)

Finally, it should be noted that a "cabaret" is the only

type of establishment mentioned by the Senate Committee in its said report accompanying the 1942 amendment. This fact, coupled with all the others hereinabove mentioned, conclusively refutes the statement of the Court of Appeals to the effect that there is nothing in course of the action taken by Congress in redefining roof gardens or cabarets in the 1942 amendment "indicating that legislative intention was confined to cabarets". (R. 298) All of the legislative history of said amendment clearly shows that the intention of Congress was so confined and that at no time was it directed to a change in the existing law which would have taken ballrooms like petitioners' out from under the admission tax imposed by Section 1700 (a) and subjected them to the lighter tax imposed by Section 1700 (e), as amended.

III.

The Decision of the Court of Appeals is in Error in Attaching Persuasive Weight to Section 101.14 of Treasury Regulations 43 in Its Interpretation of Section 1700 (e) of the Internal Revenue Code, As Amended.

The Court of Appeals, in its interpretation of Section 1700 (e) of the Internal Revenue Code, as amended, attached persuasive weight to Section 101.14 of Treasury Regulations 43. (R. 294-297) Petitioners submit that such action is error for the reasons stated in sub-divisions A and B of this division of argument.

A.

Section 101.14 of Treasury Regulations 43, Being in Substance A Restatement of Section 1700 (e) of the Internal Revenue Code, as Amended, Which the Court of Appeals Found Was Ambiguous, Such Regulation Was Equally Ambiguous and, Therefore, Entitled to Little Weight in the Interpretation of Said Statute.

The pertinent provisions of Section 101.14 of Treasury Regulations 43 (as amended by T. D. 5192, 1942-2 Cum. Bull. 249) are set forth in Appendix A, infra, pp. 75 and 76.

By comparing the first paragraph of said section with Section 1700 (e) of the Internal Revenue Code, as amended, it will be noted that the language of the former follows almost verbatim the language of the latter, the only difference being that the sentence in the regulation dealing with when a performance shall be regarded as being furnished for profit begins with the words "a public performance furnished at a roof garden, cabaret, or other similar place", while in the statute the sentence dealing with same subject matters begins simply with the words " a performance". As the trial court observed, this variation would not appear to be of significance. (R. 269)

What is significant is that said first paragraph defines the term "roof garden, cabaret, or other similar place" in indentically the same way that it is defined in Section 1700 (e), as amended, namely, as including "any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise". This being true, it

logically follows that since, as the Court of Appeals held (R. 296), the statutory definition of the term "roof garden, cabaret, or other similar place" is ambiguous, then by the same token the definition contained in said first paragraph of the regulation is equally ambiguous.

This ambiguity is not clarified by the remaining portions of the regulation. The second paragraph refers to dancing space furnished "in the dining room of a hotel, or in a restaurant, bar, etc.". Obviously, the dancing space in ballrooms like petitioners' is not furnished in a hotel dining room, a restaurant or a bar, nor are they included in the term "etc." for the reason that that term, when used following things particularly named, means other things of like kind. *Hisaw v. Ellison Ridge Consol. School Dist.*, 189 Miss. 664, 198 So. 557. Accordingly, petitioners submit that the second paragraph of the regulation, instead of showing that Section 1700 (e), as amended, was intended to apply to ballrooms, indicates just the contrary.

There still remains to be considered Example (1) appearing at the end of Section 101.14 of the regulation as follows:

> "Examples. (1) A proprietor of a dancing establishment provides for the serving of refreshments to his patrons. An admission or cover charge is made to each patron. In this case the admission or cover charges and also the charges for refreshment, service and merchandise are subject to the tax."

Commencing with the year 1926 (Article 9 of Regulations 43, (1926 Ed.)) and continuing down through the year 1940 (Section 101.14 of Regulations 43 (1940 Ed.)), the foregoing example had read as follows:

> "Examples. (1) A proprietor of a dancing establishment provides for the serving of refreshments to patrons. No charge is made for 'admission' or for

dancing. In this case the management is conducting an entertainment, the admission charge to which is wholly included in the price paid for refreshments."

It is apparent from the language of the foregoing example that the term "dancing establishment" was not used therein in its broad generic sense as including all places where people dance but was limited to those dancing establishments which make no charge for admission or dancing. Since ballrooms like petitioners', as they have always been commonly known, do charge for admission (R. 42, 69, 72, 88, 96), they were clearly not within this category of dancing establishments.

Moreover, because the example is one of those listed to illustrate the definitions of the phrase "public performance for profit" set out earlier in the regulation, the term "dancing establishment" was necessarily limited to places furnishing a public performance for profit within the meaning of such definitions. Said phrase is first defined as including "every public vaudeville or other performance or diversion in the way of acting, singing, declamation or dancing * * * conducted for the profit of the management by professionals, amateurs, or patrons under the auspices of the management, in connection with the serving or selling of food or other refreshment or merchandise at any room in any hotel, restaurant, hall, or other public place". The types of entertainment which precede the word "dancing" plus the words "conducted under" the "auspices of the management" clearly imply that the term "dancing by patrons" refers to dancing by patrons for the entertainment of other patrons and not to dancing by patrons in a ballroom.

The foregoing implication is confirmed by the very next paragraph in the regulation which is the same as the second paragraph of the 1941 regulation. Said paragraph makes it clear that the only time dancing by patrons for their own

entertainment is to be regarded as a public performance is when the space in which such patrons may dance is furnished in a "dining room of a hotel, or in a restaurant, bar, etc.". For the reasons stated earlier herein in connection with our discussion of said second paragraph of the 1941 regulation, the dance space in a ballroom is not within any of these categories.

Because of the fact that the Treasury Department for fourteen years had thus attributed the foregoing restricted meaning to the term "dancing establishment", petitioners submit that the use of that identical term in the same interpretive example the next succeeding year creates an ambiguity as to whether the Treasury Department intended said term to have the restricted meaning it had always had in prior regulations or intended that such term should have a broad meaning as to include every conceivable type of dancing establishment. In this connection petitioners point out that the reason Example (1) of Section 101.14 was changed from the way it appeared in earlier regulations was because Section 542 of the Revenue Act of 1941 made separate admission or cover charges of cabarets taxable under Section 1700 (e) whereas such charges had previously been taxable under Section 1700 (a). Consequently, it was necessary to change Example (1) to demonstrate the method of computing the cabaret tax in the case of those cabarets which sometimes made an admission or cover charge in addition to their charge for refreshment, merchandise or service.

It should be further noted that even in the 1941 regulation, the term "dancing establishment", as used in example (1), is still limited to those places furnishing a public performance for profit as defined in the second paragraph of such regulation. Said paragraph, as has already been pointed out, refers only to music and space for dancing by patrons in the dining room of a hotel, or in a restau-

rant, bar or like establishment and would not, therefore, include music and space for dancing in ballrooms like petitioners'.

Thus, it is seen that the change in Example (1) made by 1941 regulation was not intended to make the same applicable to a different type of establishment than was referred to by the example as contained in prior regulations. The District Court so held. (R. 234)

That the Treasury Department, itself, took the foregoing view of Example (1) in the 1941 regulation is shown by the statement in its letter of December 18, 1942, refusing to grant the request of the Turnpike Casino Ballroom, Lincoln, Nebraska, that it be taxed as a cabaret, said statement being as follows:

> "This office must be guided by the rulings issued by the Commissioner of Internal Revenue. The rulings which have been issued to date leave no question as to the taxability of your establishment. There seems to be no possible reason for taxing the Turnpike Casino on the basis of the cabaret tax rather than on the admission tax basis." (Pltfs.' Ex. U, R. 178, 129)

Many like rulings of the Treasury Department holding ballrooms like petitioners' not taxable under said example and regulation are hereinafter set forth in sub-division B hereof, supra. It being apparent from the foregoing analysis of the pertinent portions of Section 101.14 of Treasury Regulations 43 that such regulation is as ambiguous as the statute it purports to construe, it was, in the words from this court's opinion in *Sanford's Estate v. Commissioner*, 308 U.S. 39, 49, 60 S. Ct. 51, 84 L. Ed. 20, "without persuasive force in determining the true construction of the statute". Equally applicable are words of this court speaking through Mr. Chief Justice Hughes in *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16, 52 S. Ct. 275, 76 L. Ed. 587, as follows:

"Moreover, ambiguous regulations are of little value in resolving statutory ambiguities."

The decision of the Court of Appeals attaching persuasive weight to Section 101.14 of Treasury Regulations 43 in its interpretation of Section 1700 (e), as amended, is clearly contrary to the two decisions of this court cited above and, accordingly, is in error.

B.

Section 101.14 of Treasury Regulations 43 Being Ambiguous, the Continuous, Uniform and Undeviating Interpretation Which the Treasury Department Had Placed on Said Regulation in Actual Practice, Was Material to the Meaning to be Attributed to Said Regulation, and the Decision of the Court of Appeals Is, Therefore, In Error In Ignoring Such Interpretation.

The same rules of construction which apply to statutes govern the construction and interpretation of an administrative regulation. *Miller v. United States*, 294 U.S. 435, 439, 55 S. Ct. 440, 79 L. Ed. 977. This being true, the so-called rule of "executive construction" applicable to ambiguous statutes, namely, that the consistent and long continued practical interpretation of a doubtful statute by the executive department charged with its administration is entitled to great weight in the construction of such statute *(Brewster v. Gage*, 280 U.S. 327, 336, 50 S. Ct. 115, 74 L. Ed. 457), is equally applicable to an ambiguous regulation. This court has expressly so held in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413, 414, 65 S. Ct. 1215, 89 L. Ed. 1700, where it said:

"The problem in this case is to determine the highest price respondent charged for crushed stone during

> March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation, a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt * * * the ultimate criterion is the administrative interpretations, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

As pointed out in the preceding sub-division of this division of argument, Section 101.14 of Treasury Regulations 43 is ambiguous and of doubtful meaning. Accordingly, the consistent, uniform and undeviating administrative construction placed upon such regulation by the Treasury Department for more than six years following the adoption thereof is material in determining the meaning of such regulation and the weight to be accorded the same. The record in this case, which the government did not call a single witness or introduce a single document to contradict, conclusively shows such construction to be one which taxed ballrooms such as petitioners' under the general admissions tax provisions of Section 1700 (a), as amended, and not under the cabaret tax provisions of Section 1700 (e), as amended. Said record reveals that after November 1, 1942, the effective date of the 1942 amendment to Section 1700 (e) (Oct. 21, 1942, 56 Stat. 981), the Treasury Department expressly ruled on twelve separate and distinct occasions, commencing as early as December 18, 1942 and continuing as late as September 3, 1947, that ballrooms of the same kind and character as petitioners' (R. 36, 37, 59-62, 74, 85-88, 91, Pltfs.' Q, R. 174, 13, 128) were not subject to the cabaret tax imposed by Section 1700 (e), as amended by said amendment, but were subject to the general admissions tax imposed by Section 1700 (a), as amended by the same amendment. There were eighteen ballrooms, located

in nine different states, that received such rulings. The names of the seventeen ballrooms other than appellees' ballroom, their location, the dates of the Treasury's letters containing such rulings and the exhibit numbers of such letters are all set out in the schedule on page 10 of the petition for writ of certiorari.

In addition to this record, two ballroom operators testified that for many years they had paid only an admission tax under Section 1700 (a) and that December 2, 1948 was the first time the Treasury Department had ever notified them they should be paying a cabaret tax under Section 1700 (e) on receipts from refreshments and merchandise in their ballroom. (R. 88-90, 98)

The Court of Appeals did not itself make any independent investigation of or give any consideration to the foregoing rulings and practice interpreting Section 101.14 of Regulations 43 but said court was content with accepting as conclusive on the proposition the decision of the Court of Appeals for the Seventh Circuit in *Avalon Amusement Corp. v. United States*, 165 F. 2d 653. This is clearly shown by its statement (R. 297) that "We do not find that the court (referring to the Court of Appeals for the Seventh Circuit) in deciding the case, was insufficiently or wrongly advised as to the relation to decision of the interpretive regulation adopted by the Internal Revenue Bureau after the enactment of the statute which the court was called on to apply in the case before it". (Words in parenthesis supplied.)

The record in the case at bar shows without contradiction that the Court of Appeals for the Seventh Circuit, in making its decision in the *Avalon* case, was incorrectly advised as to the rulings and administrative practices which the Treasury Department consistently and uniformly made and followed with respect to interpretive example (1) and Section 101.14 of Regulations 43. The misinformation on which the court in the *Avalon* case relied arose from the

fact that the case was tried on an agreed statement of facts (73 F. Supp. 328) which contained nothing whatever on the consistent rulings and settled administrative practices of the Treasury Department pertinent to said example and regulation. The government in its brief filed in that case stated:

> "In addition, the applicable Treasury Regulations have *consistently* held a dance hall where refreshments are served and sold, to be subject to the tax statute concerned, and in view of the numerous re-enactments of the taxing statute by the various Revenue Acts beginning with 1926, and the various amendments thereto without disturbing the Regulations, the court should recognize the validity of such regulations and sustain the tax in question as recognizing *settled administrative practice*." (Pltfs.' Ex. Z, R. 180, 131) (italics supplied)

The foregoing statement was permitted to stand unquestioned by counsel for the taxpayers, and in view of that fact, it is apparent that the Court of Appeals accepted as true the above quoted statements in the government's brief.

By reason of the foregoing facts, the trial court, in its opinion, concluded that the court's decision in the *Avalon* case was not persuasive in the determination of the case at bar. (R. 276)

Unlike the trial court, however, the court below apparently being led into the error by its belief that it must accept as determinative the *Avalon* decision "unless convinced that it was clearly wrong" (R. 295), erroneously found that the Court of Appeals in that case was not "insufficiently or wrongly advised as to the relation to decision of the interpretive regulation * * *".

Furthermore, the court below erroneously assumed that petitioners relied upon the Treasury's consistent rulings and settled practice with respect to said regulation and interpretive example (1) as working an estoppel against the

government notwithstanding the fact, as pointed out by the District Court (R. 260), petitioners made no such claim. Such rulings and practices were shown in evidence for the purpose of explaining the meaning which the Treasury Department had placed on an ambiguous regulation construing an ambiguous statute.

The aforesaid administrative rulings and practices were, under the decisions of this court, material to the question herein involved, and petitioners submit that the Court of Appeals is in error in ignoring the same.

IV.

The Committee of Congress In Which the Revenue Act of 1942 Originated Having Expressly Stated In Its Report That the Object of Such Act Was To Increase Taxes, and No Contrary Intent Appearing In Either the Statute or Said Report, the Court of Appeals, In Finding That Congress "May" Have Intended to Reduce the Amusement Tax on Ballrooms, Entered the Realm of Speculation and, In So Doing, Is In Error.

Petitioners argue on pages 50 and 51 of this brief that Congress in enacting the 1942 amendment to Section 1700 (e) of the Internal Revenue Code could not have intended to remove ballrooms like petitioners' from the admission tax status they had always occupied under Section 1700 (a) and give them a new tax status under Section 1700 (e), because to do so would have substantially decreased the amount of amusement taxes payable by such ballrooms, a result which would have been directly contrary to the policy of Congress announced in the Report of the House Ways and Means Committee, No. 2333, accompanying the bill for the Revenue Act of 1942 in which said amendment

was contained. That policy was stated in said report, to be as follows:

> "It is thus apparent that our revenue needs are extreme and your committee has endeavored to secure every dollar of additional revenue which, in its opinion, the national economy can bear." (C. B. 1942-2, p. 373)

This same argument was made by petitioners in the court below. That court rejected said argument by stating in its opinion (R. 299) as follows:

> "Nor is there any conclusiveness about the computation showing the cabaret tax in 1941* figured out less than the admission tax would have done. Applying the cabaret tax to the dance hall and its gross receipts from admissions, soft drinks, chewing gum, candy bars, cigarettes and check room service broadens the base of taxation and its imposition compelled disclosure of the business done. Congress may have found those considerations more important than the amount of the first year's tax."

From the foregoing statement, it is apparent that the Court of Appeals refused to accept the clear and emphatic expression of Congressional intent to greatly increase taxes made in the report of the committee in which the 1942 Revenue Act originated, but instead found that Congress may have intended to decrease the amusement taxes on ballrooms because of other considerations, notwithstanding that no such intent appears anywhere in either said report or said statute. In so finding, the Court of Appeals entered the realm of speculation and is, therefore, in error under the decisions of this court that it is not permissible to speculate as to the intent of Congress in passing a statute

---

*Petitioners assume the court had reference to the year 1942 since that was the year when the amendment defining a roof garden, cabaret, or other similar place was adopted. See Act Oct. 21, 1942, 56 Stat. 981.

when evidence of such intent, as in the present case, is available. *Helvering v. Griffiths*, 318 U.S. 371, 401-402, 63 S. Ct. 636, 87 L. Ed. 843; *Taft v. Commissioner*, 304 U.S. 351, 359, 58 S. Ct. 891, 82 L. Ed. 1393.

V.

The Decision of the Court of Appeals Is In Error In Holding That Petitioners' Ballroom Furnished a "Public Performance".

The Court of Appeals held that the operation of petitioners' ballroom was a "public performance". (R. 296) The court based this holding on the declaration of the Court of Appeals for the Seventh Circuit in the case of *Avalon Amusement Corporation v. United States*, 165 F. 2d 653, that "a hall in which music for dancing is furnished to any one of the public who is able and willing to pay the admission fee is an establishment furnishing a public 'performance' * * *." (R. 296)

Petitioners contend that the foregoing holding is in error for the reason that it is not justified by the language of either Section 1700 (e) of the Internal Revenue Code, as amended, or Section 101.14 of the Treasury Regulations interpreting the same. In support of this contention, petitioners point out that in order for an establishment to be taxable under said statute, it must meet three requirements; namely, it must be (1) "a roof garden, cabaret, or other similar place", (2) furnish a "public performance", and (3) the performance must be for profit. The statute defines the term "roof garden, cabaret, or other similar place" as including a "hall * * * where music and dancing privileges * * * are afforded patrons * * *". It also defines a "performance for profit". The statute does not define public performance. The Court of Appeals, however, in approving the definition of the court in the *Avalon* case as

a "hall in which music for dancing is furnished to any one of the public * * *", thereby ascribed to such term the same meaning Congress used in defining a "roof garden, cabaret, or other similar place".

To thus place on the term "public performance" the same meaning Congress using in defining "roof garden, cabaret, or other similar place" is unreasonable and illogical for the reason that it requires a court to hold that the use of the term "public performance" by Congress was surplusage. The rule is well established that all words in a statute will, if possible, be given full effect and none will be deemed surplusage. *McDonald v. Thompson*, 305 U.S. 263, 266, 59 S. Ct. 176, 83 L. Ed 164; *Stephens v. Cherokee Nation*, 174 U.S. 445, 480, 19 S. Ct. 722, 43 L. Ed. 1041.

Nor does Section 101.14 of the Regulations support or warrant the meaning which the Court of Appeals attributed to the term "public performance". On the contrary the said regulation limits the term "public performance" to music and dancing space in the "dining room of a hotel, or in a restaurant, bar, etc.". As previously demonstrated in this brief (p. 55), music and dancing space in a ballroom like petitioners' is not music and dancing space in a "dining room of a hotel, or in a restaurant, bar, etc." for the reason that the latter are all establishments which are, in fact, dissimilar and distinct from such a ballroom.

Thus, it appears that the meaning of the term "public performance" is not made clear by either the statute or the regulation. The term, therefore, must be given its ordinary and usual meaning. "Public performance", given its ordinary and usual meaning, means something akin to a vaudeville act, or some other act of entertainment that a proprietor puts on for his patrons to witness or see. Certainly a ballroom operator's providing of music and a space in which patrons come to dance and not to see others dance is not furnishing a public performance. The music and danc-

ing space is furnished by such operator to patrons in order that they may exercise the privilege of dancing which they secured by the payment of the purchase price for an admission ticket to his ballroom.

Moreover, it cannot be contended in the present case that the patrons of the Laramar Ballroom came there for the purpose of sitting around and watching the dancing without participating in it. The court rejected that contention in his opinion (R. 273-274), and found from the evidence that "the number of persons who buy admission tickets to ballrooms and do not dance is negligible." (R. 284) In this same connection, the court further found that "the primary purpose of those attending a ballroom is to dance." (R 284)

Nor can it be contended that dancing by the patrons of a ballroom constitutes a public performance. Petitioners submit that the term, "public performance", as applied to dancing in a public ballroom, does violence to the plain and ordinary meaning of those words, when viewed from the standpoint of the operator of the ballroom and the dancers therein. Take first of all the viewpoint of the ballroom operator. He regards himself as furnishing a place and music for dancing by people for their own enjoyment and not as furnishing dancers for the enjoyment of others. He does not pay them to dance. Instead, they pay him in order to dance. In the case of a performer giving a public performance in the usual and ordinary sense in which that term is used in the entertainment world, just the reverse is true.

Next, take the viewpoint of the dancers. They consider themselves as dancing for their own pleasure and recreation and not for the entertainment of others. The actor who participates in a floor show in a cabaret night after night can scarcely be said to be doing it for his own recreation and enjoyment. He does it in order to earn a living.

The 1942 amendment to Section 1700 (e) did not change the definition of a "public performance" to make such term include music and dancing at a public ballroom. Nor did it change the requirement that there had to be a "public performance" furnished by the owner of a "roof garden, cabaret, or other similar place". Since, as pointed out above, "public performance" cannot reasonably be said to include either music and dancing space in a ballroom like petitioners' or dancing by patrons for their own enjoyment and not for the entertainment of others, petitioners submit that the second criterion required by the statute, i.e., "a public performance for profit", is not met by the ballroom involved in the present case, and the Court of Appeals is in error in holding otherwise.

VI.

The District Court's Finding of Fact That Petitioners' Ballroom Was An Establishment "Separate, Distinct and Dissimilar" From a Roof Garden and a Cabaret Was Supported by Substantial Evidence, and the Court of Appeals Is In Error In Making A Substitute Finding Contrary Thereto.

The District Court, in its Finding No. 15, found that "cabarets and roof gardens are types of establishments which are separate, distinct, and dissimilar from ballrooms of the type and kind operated by the plaintiffs." In Finding No. 13 the court also found that "the primary purpose of those attending a ballroom is to dance. Only a small percentage of cabaret patrons do make use of the dancing privileges afforded. Cabaret patrons usually and generally patronize such establishments for purposes other than dancing, such purposes being to see the floor show, to entertain guests, and to partake of food and drink." (R. 284)

The Court of Appeals rejected the foregoing findings and, instead, substituted its own findings as follows:

> "Though each point of dissimilarity between dance halls and cabarets has been noted, the points of similarity are more conspicuous. Both provide dancing facilities for and sell refreshments to patrons * * *. The business of both is to provide public performances with dancing."

This finding was in effect a finding that ballrooms such as petitioners' and cabaret are similar. The testimony of witnesses from all branches of the entertainment field, summarized on pages 5 to 8 of the petition for writ of certiorari, flatly contradicts this finding and abundantly supports the finding of the trial court. This being true, the Court of Appeals is in error in upsetting the latter court's finding and substituting its own. *McCaughn v. Real Estate Land, Title & T. Co.*, 297 U.S. 606, 608, 56 S. Ct. 604, 80 L. Ed. 879; *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 407, 54 S. Ct. 443, 78 L. Ed. 859.

This substitution of finding of fact on the matter in question is prejudicial to petitioners for the reason that Congress did not, by its statutory definition of roof garden, cabaret, or other similar place, intend to include an establishment which was in fact dissimilar to a roof garden or cabaret. To establish the foregoing proposition, petitioners now turn to consider the statutory definition which became a part of Section 1700 (e) of the Internal Revenue Code by the 1942 amendment thereto.

Petitioners concede that the legislative body can define a term as it may see fit. It can define white to be black. However, an intent to do such an unusual and extraordinary thing must be plain, manifest and unmistakable. In view of this rule, petitioners submit there is a vast distinction between a definition on the one hand that: any place where music and dancing privileges or other entertainment is

afforded patrons in connection with the serving or selling of food, refreshment, or merchandise shall be deemed a cabaret; and on the other hand, a definition which says that a cabaret, roof garden, or other similar place shall include any place where music and dancing privileges or other entertainment is afforded patrons in connection with the serving or selling of food, refreshment, or merchandise. By the first definition, the legislative body would have made it plain that any establishment coming within the literal words of the definition was to be deemed a cabaret. Such language would have been the equivalent of saying white is black.

However, the second definition, wherein the law-making body says that a cabaret shall include a place where music and dancing privileges are afforded patrons in connection with the serving or selling of food, refreshment, or merchandise, makes manifest an intention that a place to be included cannot, in fact, be dissimilar.

If this were not true, then every establishment, such as a movie theater or skating rink, selling soft drinks and popcorn would be within the statutory definition since it would be a place affording its patrons entertainment in connection with the selling of refreshment and merchandise. Such a meaning would lead to absurd results and, accordingly, must be rejected.

That the statutory definition was not intended to encompass establishments which were, in fact, dissimilar to a roof garden or cabaret is conclusively shown by the fact that the Treasury Department, by its consistent rulings and settled practices, excluded from the purview of the definition ballrooms of the type and character of petitioners' as cabarets. Such rulings and practices are fully reviewed in Sub-Division B of Division III of this argument.

VII.

The Court of Appeals, In Construing Section 1700 (e) of the Internal Revenue Code, As Amended, Misapplied the Rule That a Statute Will Be Construed As To Avoid Absurd or Unreasonable Results and, In So Doing, Is In Error.

The rule of statutory construction stated in the foregoing brief point was announced by this court in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460, 36 L. Ed. 226, as follows:

> "The language of the Act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the Act must be construed as to avoid the absurdity."

Application of the foregoing rule in the present case requires a determination of whether or not the language of Section 1700 (e) of the Internal Revenue Code, as amended, if construed literally, produces an absurdity and if so, then that said language be construed as to avoid such absurdity.

Petitioners submit that a literal construction of the language of the statute does produce an absurdity because it brings within the purview of the definition establishments which are dissimilar in fact to a "roof garden, cabaret, or other similar place". Such absurdity can be forcefully illustrated by applying a literal construction of such language to indoor skating rinks which, as the record in this case shows, sell popcorn, candy and soft drinks and furnish music while skating is in progress (R. 38). It is common knowledge that many skaters waltz to such music. Accordingly, such a rink comes within the literal language of the statutory definition because it is "a room" in a "place where music and dancing privileges or any other entertainment

" " " are offered patrons in connection with the serving or selling of food, refreshment or merchandise."

Also take for example, a movie theater which, as the record shows, sells popcorn, candy and soft drinks in the lobby while a picture is being shown. (R. 38) It comes squarely within language of the statutory definition when literally construed because it is "a room" in a "place" where "entertainment" is "afforded patrons in connection with the serving or selling of food, refreshment or merchandise".

It is common knowledge that soft drinks, popcorn, peanuts and candy are also sold in fieldhouses, sports arenas, concert halls and indoor circuses while the entertainment is in progress. Literally, each can be said to be "a room" in a "hall or other public place" in which "entertainment" is "afforded the patrons in connection with the serving or selling of food, refreshment or merchandise" and, therefore, within the definition of Section 1700 (e), as amended.

It would be wholly absurd to include the above mentioned establishments within the statutory definition even though the language thereof, if literally construed, applies to them. The reason such inclusion would be wholly absurd is that it encompasses places of entertainment which in their essential characteristics are dissimilar in fact from a roof garden and a cabaret. The District Court, having found as a fact on substantial evidence that ballrooms such as petitioners' are "separate, distinct and dissimilar" from a roof garden and cabaret (R. 285), it is just as absurd to include them within Section 1700 (e), as amended, as it would be to include skating rinks, movie theaters and the other places above mentioned which also sell refreshments and merchandise.

In failing to recognize this absurdity resulting from a literal construction of said section, the Court of Appeals

misapplied the rule that a statute will be construed so as to avoid absurd or unreasonable results and is, therefore, in error.

VIII.

The Court of Appeals Is In Error In Holding That It Was Not Justified in Refusing to Follow the Decision of the Court of Appeals for the Seventh Circuit In the Case of Avalon Amusement Corporation v. United States, 165 F. 2d 653, "Unless Convinced That It Was Clearly Wrong".

The Court of Appeals at the very outset of its opinion held that in the interest of uniformity of decision among the circuits, it "would not be justified in refusing to follow the decision of the Circuit Court of Appeals in the *Avalon* case unless convinced it was clearly wrong." (R. 295)

Under the rule announced by this court in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488, 489, 20 S. Ct. 708, 44 L. Ed. 856, "it is only when a reviewing court has a doubt as to the soundness of its own views that comity comes in play and suggests a uniformity of ruling to avoid confusion." The court below made no application of this rule of comity of decision. Instead of considering the issue in the case at bar on its merits and resolving that question independently the court first proceeded on the assumption that it must follow the decision in the *Avalon* case unless convinced it was clearly wrong. Such procedure colored the court's entire approach to and consideration of the question before it in this case and thereby deprived petitioners of the impartial review of the case to which they were entitled in an appellate court.

CONCLUSION.

For all the reasons stated writ of certiorari should be granted in this cause and this court should review the decision of the Court of Appeals for the Eighth Circuit and finally reverse it.

Respectfully submitted,

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
LOUIS A. PARKER,
CHRISTOPHER T. BOLAND,
Attorneys for Petitioners.

GALLAGHER, OSHERMAN,
CONNOR AND BUTLER
of Counsel.

APPENDIX A

STATUTES AND REGULATIONS.

Section 1700 (e) of the Internal Revenue Code, as amended by Section 542 of the Revenue Act of 1941, c. 412, 55 Stat. 711, Section 622 of the Revenue Act of 1942, c. 619, 56 Stat. 981, and Section 3 of Act of June 9, 1944, c. 240, 58 Stat. 273.

"Section 1700. There shall be levied, assessed, collected and paid—

(e) Tax on Cabarets, Roof Gardens, etc.

(1) Rate.—A tax equivalent to 20 percentum of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under sub-section (a) (1) on account of an amount paid with respect to which tax is imposed under this subsection.

(2) By whom paid.—The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments."

The pertinent provisions of Treasury Regulations 43 (1941 Ed.):

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	4
Argument	9
Conclusion	14

CITATIONS

Cases:

Avalon Amusement Corp. v. *United States*, 165 F. 2d 653	11
Manhattan Co. v. *Commissioner*, 297 U. S. 129	13

Statutes:

Internal Revenue Code, Sec. 1700 (26 U.S.C. 1946 ed., Sec. 1700)	2, 9, 10, 11, 12
Revenue Act of 1942, 56 Stat. 798, Sec. 622	13

Miscellaneous:

Treasury Regulations 43, Sec. 101.14	3, 12

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 527

LARRY V. AND MARGARET E. GEER, D/B/A LARRY GEER BALLROOMS, PETITIONERS

v.

WILLIAM E. BIRMINGHAM, ET AL., AS EXECUTORS OF THE ESTATE OF E. H. BIRMINGHAM, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Iowa (R. 198-278) is reported in 88 F. Supp. 189, the opinion of the Court of Appeals (R. 290-300) in 185 F. 2d 82.

JURISDICTION

The judgment of the Court of Appeals was entered November 10, 1950. (R. 300.) The petition for certiorari was filed January 30, 1951.

QUESTION PRESENTED

Whether amounts paid by patrons of the Laramar Ballroom for admission tickets, for the checking of their wraps, and for refreshment and merchandise purchased by them are subject to the so-called cabaret tax under the provisions of Section 1700(e)(1) of the Internal Revenue Code as amended.[1]

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 1700 [as amended by Sec. 542, Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 622 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 3 of the Public Debt Act of 1944, c. 240, 58 Stat. 272-273]. TAX.
>
> There shall be levied, assessed, collected, and paid—
>
> * * * * *
>
> (e) *Tax on Cabarets, Roof Gardens, Etc.*—
>
> (1) *Rate.*—A tax equivalent to 20 percentum of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place

[1] Petitioners paid a tax of 20 percent on the amounts received from their patrons for admissions tickets to the ballroom, but they do not seek a refund of those payments. Consequently, the tax on those receipts is not involved here. If the admission receipts are not subject to the cabaret tax under Section 1700(e)(1) of the Internal Revenue Code, *infra*, they are subject to the admissions tax of 20 percent under Section 1700(a)(1) of that Code (26 U.S.C. 1700(a)(1)). However, if petitioners' dancing establishment falls within the purview of Section 1700(e)(1), the admission receipts, as well as the other receipts, would be taxable under that section.

furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a) (1) on account of an amount paid with respect to which tax is imposed under this subsection.

(2) *By whom paid.*—The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1700.)

Treasury Regulations 43 (1941 ed.):

Sec. 101.14 [as amended by T.D. 5192, 1942-2 Cum. Bull. 249]. *Scope of Tax.*—The term "roof garden, cabaret, or other similar place" includes any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection

with the serving or selling of food, refreshment, or merchandise. A public performance furnished at a roof garden, cabaret, or other similar place shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

Where music, whether by an orchestra, a mechanical device, or otherwise, and a space in which the patrons may dance is furnished in the dining room of a hotel, or in a restaurant, bar, etc., the entertainment constitutes a public performance for profit at a roof garden, cabaret, or similar place, and the payments made for admission, refreshment, service, and merchandise are subject to the tax.

* * * * *

Examples. (1) A proprietor of a dancing establishment provides for the serving of refreshments to his patrons. An admission or cover charge is made to each patron. In this case the admission or cover charges and also the charges for refreshment, service, and merchandise are subject to the tax.

* * * * *

STATEMENT

The facts as found by the district court (R. 278-285) and concurred in by the court below (R. 291-292), may be summarized as follows:

Petitioners are a partnership composed of husband and wife. Since 1938 they have operated a

ballroom at Fort Dodge, Iowa, known as the Laramar Ballroom. The ballroom is operated in portions of two adjacent buildings leased by them. In the basement is located petitioners' business office, a checkroom, and a fountain counter. On the first floor of those buildings is a dance floor, 58 x 100 feet, a lounge with a seating capacity of 43 people, and a small lobby in which is located a box office where tickets for admission to the ballroom are sold. A balcony is located on the second floor overlooking the dance floor. The balcony is approximately 8 feet wide and extends around the entire dance floor at a height of 10 feet. The balcony contains a fountain counter and 38 booths which seat 152 people. Another room, 20 x 70 feet, in the adjacent building, connected with the dance floor by two entrances, contains another fountain counter and 35 booths which seat 140 people, but no area for dancing. On certain nights 32 additional seats are provided for ballroom patrons by the placing of 32 steel folding chairs around the edge of the dance floor. The total seating capacity of the space occupied by the petitioners is about 350, not including the folding chairs. The dance floor itself can accommodate 2,000 people. The ratio of seating capacity to dance floor capacity is 17½ percent. (R. 278-279.)

During all of the time the Laramar Ballroom has been operated by petitioners, admission thereto

could be obtained only by the purchase of a ticket at the box office located in the lobby just inside the street entrance and the presentation of such ticket to a ticket taker stationed at the door connecting the lobby with the dance floor. The purchase of an admission ticket entitled the purchaser to dance the entire evening without further charge. Such admission ticket also entitled the purchaser to use the seats in the lounge and the seats in the room in the adjacent building without further charge. The number of people who purchased admission tickets to the ballroom and who did not avail themselves of the dancing privileges there afforded was, and is, negligible. The purchaser of an admission ticket could rent one of the booths in the balcony for 60 cents per evening, or could use one of those booths without additional charge until it was rented to another patron. In the year 1948 the total receipts from booth rentals amounted to approximately one half of one percent of the total receipts of the ballroom. (R. 279-280.)

Petitioners held dances in their ballroom regularly on Thursday, Saturday and Sunday nights, starting in September and ending in May of each year. They also held dances there on national holidays not falling on one of the regular operating days. Dance bands or orchestras of local and national reputation furnished music for the dances. Entertainment distinct and separate

from the dance music has not been provided at any time. (R. 280.)

On dance nights the music for the dancing begins at 8:30 P. M. and ends at 12:30 A. M. of the following day with two ten minute intermissions for the orchestra during the evening. Except for these intermissions, and for the time taken by the members to turn their music, the dance music is continuous. The members of the orchestra do not leave the orchestra platform except during the intermissions. The ballroom is open approximately 30 minutes before the dance music starts, and is closed as soon after the music stops as the patrons can get their wraps and leave. (R. 280.)

The regular established admission charge to petitioners' ballroom is 55 cents on Thursday nights prior to 9:00 P. M. and 65 cents after that hour; 65 cents for Saturday nights and 75 cents for Sunday nights. These prices include the federal admissions tax under Section 1700 (a) (1) of the Internal Revenue Code (26 U.S.C. 1700 (a)(1)). (R. 281.)

From the time the ballroom opens on dance nights and until the dance music ends, the only items which petitioners have available for sale to their patrons are soft drinks, peanuts, popcorn, candy, gum, and cigarettes. Waitresses are available from whom these items may be ordered by patrons seated in any booth. Patrons may also purchase these items at any one of the three foun-

tain counters. With the exception of cigarettes, which for a time were sold at twenty cents per pack, the prices charged for these refreshments and merchandise have remained constant and are the same charged for them at other retail outlets. There are no menus provided in connection with the sale of these items, and no meals or sandwiches are served by the petitioners at any time. There are no facilities for cooking in the ballroom and no silverware or table linen. The only dishes used are water glasses and popcorn bowls. In the operation of their establishment petitioners always represented and advertised it as a ballroom or dance hall with dancing as the sole entertainment. They had never represented or advertised it as a place where meals or other food was dispensed. During the year 1948, the average amount spent by a patron for the items of refreshment and merchandise referred to was twenty-seven cents. (R. 281-282.)

Since 1939 a checkroom has been provided for those patrons who wish to check their wraps. A charge of ten cents is made for this service. The checking of wraps is optional with the patrons. (R. 282.)

For the year 1948 the receipts from the sale of admission tickets constituted approximately sixty-seven percent of the gross income of the establishment, receipts from the sale of refreshments approximately 27 percent, and receipts from the checkroom approximately 6 percent (R. 282).

On December 2, 1948, the United States Collector of Internal Revenue for the State of Iowa demanded that petitioners pay the cabaret tax of 20 percent under Section 1700(e) of the Internal Revenue Code, *supra*, pp. 2-3, on their receipts covering admissions, wrap checking, and sales of merchandise and refreshments (R. 98, 162, 164). Petitioners paid the cabaret tax and, after their timely claim for refund had been denied, brought this action against the collector in his individual and official capacities to recover a refund of the cabaret tax paid by them on their receipts covering wrap checking and sales of merchandise and refreshments[2] (R. 1-4, 8-13). The district court, after overruling the collector's motion to dismiss, held that the receipts from petitioners' ballroom were not taxable under Section 1700(e)(1) of the Internal Revenue Code, and accordingly entered judgment in favor of petitioners. On appeal to the Court of Appeals for the Eighth Circuit, that court reversed the judgment of the district court and remanded the case with directions to dismiss the complaint (R. 291-300). The collector, E. H. Birmingham, having died on November 20, 1950, his executors, respondents here, were substituted in his stead on January 8, 1951 (R. 304).

ARGUMENT

1. Petitioners advance several somewhat tortuous arguments (Br. 36-65) in an endeavor to show

[2] See footnote 1, *supra*, p. 2, with respect to the admission receipts.

"Section 101.14 (as amended by T. D. 5192, 1942-2 Cum. Bull. 249). *Scope of Tax.*—The term 'roof garden, cabaret, or other similar place' includes any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A public performance furnished at a roof garden, cabaret, or other similar place shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

Where music, whether by an orchestra, a mechanical device, or otherwise, and a space in which the patrons may dance is furnished in the dining room of a hotel, or in a restaurant, bar, etc., the entertainment constitutes a public performance for profit at a roof garden, cabaret, or similar place, and the payments made for admission, refreshment, service, and merchandise are subject to the tax.

. . . . . .

Examples. (1) A proprietor of a dancing establishment provides for the serving of refreshments to his patrons. An admission or cover charge is made to each patron. In this case the admission or cover charges and also the charges for refreshment, service, and merchandise are subject to the tax."

that the decision of the court below is in conflict with decisions of this Court because of its failure to apply various principles of statutory construction, but the sum of their contentions amounts to no more than an assertion that the court below erred in construing the language of Section 1700(e)(1) of the Internal Revenue Code, as amended, to impose the cabaret tax on the receipts of their dancing establishment.

Section 1700(e)(1) of the Internal Revenue Code, as amended, *supra,* pp. 2-3, imposes an excise tax of 20 percent (commonly referred to as the cabaret tax) on the amounts paid for admission, refreshment, service, or merchandise at any roof garden, cabaret, or other similar place funishing a public performance for profit. The term "roof garden, cabaret, or other similar place" is defined by the section to include "any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise."

In construing the language of Section 1700(e)(1), the court below held that petitioners' dancing establishment fell within the reach of the section with regard to both the character of the establishment and the nature of the entertainment furnished to petitioners' patrons, *i.e.*, the music and

dancing privileges were afforded in connection with the serving of refreshments, and the music and dancing privileges furnished constituted a public performance for profit within the meaning of that term as used in the said section. In so holding, the court below relied upon the plain language of the section, supporting its conclusion with excerpts from the decision of the Seventh Circuit in the case of *Avalon Amusement Corp.* v. *United States,* 165 F. 2d 653, wherein that court, likewise relying on the plain language of the section, squarely held that Section 1700(e)(1) was applicable to a dancing establishment practically identical with that of petitioners. Thus, the only two courts of appeal that have construed Section 1700 (e)(1) with respect to its applicability to dancing establishments such as that of petitioners, are in complete harmony of conclusion that the language of the section itself reasonably justifies a construction that brings such establishment within its purview. In the circumstances, the case does not warrant further review on the ground that the court below did not ascertain the intention of Congress by applying exclusively the technical rules of statutory construction to which petitioners point.

2. Petitioners contend here (Br. 39-53), as they did below, that their ballroom was not a "cabaret, or other similar place" within the meaning of Section 1700(e)(1). Assuming that petitioners' ballroom was not a cabaret in the ordinary sense

of that term, we believe, nevertheless, that the similarities between a cabaret and petitioners' establishment (R. 299) justified the conclusion of the court below that their establishment came within the purview of Section 1700(e)(1). There is no question, of course, that public dancing privileges were afforded by petitioners to their patrons in the ballroom in connection with the serving and selling of refreshments and merchandise, and that is enough to bring the establishment within the reach of the section. As the court below held, petitioners' dancing establishment came within the term "roof garden, cabaret, or other similar place," if for no other reason than that the section states that such term shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, with the exceptions noted, are afforded patrons in connection with the serving or selling of food, refreshment, or merchandise. We believe that the construction placed on the section by the court below, and by the Seventh Circuit in the *Avalon* case, was correct, and, as both of those courts held, that Section 101.14 of Treasury Regulations 43 (1941 ed.), as amended by T. D. 5192 (1942-2 Cum. Bull. 249, *supra,* pp. 3-4), was designed reasonably to carry out the statute.

Considerable stress is laid by petitioners on the fact that the officials of the Bureau of Internal Revenue interpreted Section 1700(e)(1) as not

including dancing establishments such as that of petitioners for a considerable period of time after the section was amended in 1942 [3] by the addition of the definition of the term "roof garden, cabaret, or other similar place." And they contend that the section should now be construed in harmony with the previous administrative interpretation. The contention ignores the fact that both the court below and the Seventh Circuit have, in effect, found the previous administrative interpretation to be wrong. Since the original interpretation by the Bureau officials was wrong, it could not alter the statute. Thus, the present interpretation pointed the way for the first time to a correct administration of the section. Cf. *Manhattan Co.* v. *Commisioner*, 297 U. S. 129-135.

Petitioners make the further contention (Br. 68-70) that the holding of the trial court to the effect that petitioners' dancing establishment was an establishment dissimilar to a roof garden or cabaret constituted the determination of a question of fact which the court below was not authorized to disturb. The contention is without substance. The determination of the meaning of the words used in a statute is obviously not a finding of fact or a matter within the exclusive province of the trial court.

---

[3] Revenue Act of 1942, Section 622, 56 Stat. 798.

CONCLUSION

There is no conflict of decisions. The decision of the court below is clearly correct, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
CARLTON FOX,
Special Assistants to the Attorney General.

JOHN R. BENNEY,
Attorney.

MARCH 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 932903 601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

GENERAL MOTORS CORPORATION,
Petitioner,

vs.

CHRIS BOLTEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioner respectfully prays this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review a judgment entered on March 7th, 1950.

The Court of Appeals reversed the judgment of the District Court entered on petitioner's motion for summary judgment. It directed the District Court to allow Respondent to dismiss without prejudice.

The Court of Appeals by judicial fiat has stricken from Rule 41 (a) (2) of the Rules of Civil Procedure the clause denoting the District Court's discretionary power to specify in the order that the dismissal is with prejudice, viz:

Rule 41 (a) (2)

> "By order of court. * * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * *Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice." (Emphasis supplied.)

The Court of Appeals held: (1) When respondent moved to dismiss "without prejudice and without costs" the District Judge was bound to permit dismissal without prejudice. (2) Rule 41 (a) (2) of the Rules of Civil Procedure empowered the court to fix terms of dismissal; but did not permit it to deny the motion. (3) For nineteen days before respondent moved to dismiss, the Judge had had under advisement petitioner's motion for summary judgment; the Court of Appeals held, however, that the motion to dismiss divested the District Judge of discretion except to fix the terms of dismissal (R. 49).

Petitioner represents to this court:

SUMMARY AND SHORT STATEMENT.

Respondent is a resident of Missouri (R. 2). Petitioner, a Delaware Corporation (R. 2), is amenable to court process in Missouri. Respondent sued petitioner on October 1, 1948 in United States District Court at Chicago (R. 2). He alleged: He was employed by Kelley Asbestos Products Company. While working for Kelley, he was injured in Petitioner's plant near Kansas City, Missouri, on July 2, 1946 (R. 2-3).

Petitioner pleaded: A. The Illinois two year statute of limitations; B. Respondent had received an award under the Missouri Workman's Compensation Act against Kelley Asbestos Products Company (R. 7-8).

Respondent filed thirty-two interrogatories for petitioner to answer (R. 4-6). Thirty-one required information availab'e in Missouri exclusively (R. 4-6).

Petitioner on November 12, 1948 moved for judgment (R. 9) on the ground actions for injury to the person are to "be commenced within two years next after the cause of action accrued." Ill. R. S. Chap. 83 Sec. 15 (R. 9). The District Court took the motion under advisement.

On December 1, after the court had had Petitioner's motion for summary judgment under advisement for nineteen days, Respondent moved to dismiss "without prejudice and without costs" (R. 10).

Respondent did not in his motion, nor at any time before judgment was entered, indicate to the court he was interested in a dismissal on terms other than "without prejudice and without costs" (R. 10).

On December 6, in support of his motion to dismiss "without prejudice and without costs", Respondent urged:

A. The Missouri statute of limitations was five years. Mo. R. S. 1939, Sec. 1014 (R. 11). Respondent would have until July 1, 1951 to commence his suit in Missouri.

B. The court in the alternative might transfer the cause to United States District Court at Kansas City, Missouri, under section 1404 of the Judicial Code. 28 U. S. C. A. 1404. (R. 12).

C. Respondent's recovery against his employer under the Missouri Workmen's Compensation Act alleged in Petitioner's answer (R. 7-8) does not bar an action against a third person.

Respondent cited the Missouri statute. Mo. R. S. 1939, Sec. 3699 (R. 12). Under this section the right of recovery is in the employer. After deducting the expense of suit and reimbursing himself for compensation paid, the employer pays the residue to the employee (See Appendix for statute, *infra* 17).

Respondent did not claim there was east of Missouri any witness for his case.

The judge held: Respondent selected the forum. The Court was obliged to apply the law as it exists in the district (R. 22-23). 81 F. Supp. 851.

On February 4, 1949, Respondent filed a motion to set aside the judgment. Respondent stated "that his motion for leave to dismiss without prejudice and without costs was inadvertently made, and should not have requested leave to dismiss without costs" (R. 24).

This motion was denied (R. 33).

In Missouri a judgment for defendant rendered in another jurisdiction on a plea of limitations is a defense to a second action. The rule applies even though the Missouri statute of limitations has not run when the second action is begun. *Fulton Iron Works* v. *Riggin*, 14 Mo. App. 321; *Wernse* v. *McPike*, 100 Mo. 476, 13 S. W. 809.

The Court of Appeals held: that Rule 41 (a) (2) of the Rules of Civil Procedure, 28 U. S. C. A. 723C, gives plaintiff an absolute right to dismiss restricted only by the requirement that it be upon order of the court and upon such terms and conditions as the court deems proper (R. 39). 180 F. (2) 379 at 381.

BASIS FOR JURISDICTION OF THIS COURT.

This Court has jurisdiction under Title 28, United States Code, Section 1254 (1).

THE QUESTIONS PRESENTED.

I.

Does not the italicized clause of the following provision of Rule 41 (a) (2) of the rules of Civil procedure:

> "By order of Court. * * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * *Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice." (Emphasis supplied.)

denote that the judge may specify in the order that dismissal is with prejudice?

II.

When Respondent on December 1, 1948, moved to dismiss "without prejudice and without costs" (R. 10) did he thereby divest the district judge of discretion to rule on the motion for summary judgment which motion the court had had under advisement for nineteen days (R. 9)?

III.

When a motion to dismiss without prejudice is made under 41 (a) (2) of the Rules of Civil Procedure, does the District Court have any discretion to consider the merits of the motion, or is the District Court regardless of the merits of the motion bound to order dismissal on terms?

REASONS FOR ALLOWANCE OF WRIT.

I.

The Court of Appeals by construction has deleted from Rule 41 (a) (2) of the Rules of Civil Procedure the clause which we italicize:

> "By order of Court. * * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * *Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice."

The clause was intended to denote a discretion in the District Judge to allow or not to allow a plaintiff to dismiss without prejudice. This important question of Federal law has not been but should be passed upon by this court.

II.

a. The Court of Appeals has construed Rule 41 (a) (2) of the Rules of Civil Procedure as requiring the District Court to allow a plaintiff to dismiss without prejudice at any time before final judgment. The decision conflicts with *U. S.* v. *Pacific Fruit* (1943 9 Cir.), 138 F. (2d) 367. In this latter case plaintiff unsuccessfully moved for a continuance. Plaintiff then asked leave to dismiss without prejudice. The Judge ruled that dismissal without prejudice would be on condition the Government pay a certain sum to the defendant as costs. Upon failure of the Government to pay, the court dismissed the action with prejudice. The Court of Appeals held that the order that the Government pay costs was void, that the Trial Judge under

Rule 41 (a) (2) was vested with discretion empowering him to deny the motion to dismiss without prejudice and to dismiss the cause on the merits.

The Court of Appeals for the Fourth Circuit in *Rollison* v. *Wash. Nat. Ins. Co.* (1949), 176 F. (2d) 364 at par. 4, p. 367 held that Rule 41 vests the District Court with discretion to deny a motion to dismiss without prejudice.

b. The ruling by the Court of Appeals that the District Judge was bound to allow dismissal without prejudice to permit respondent to file his action in Missouri is squarely in conflict with a decision by the Second Circuit prior to the adoption of the Rules of Civil Procedure.

In *Young* v. *Southern Pacific Co.* (1928), 25 F. (2d) 630 the proceeding had been removed from the State Court. The defendant moved to dismiss on the ground of laches. The court allowed complainant to dismiss without prejudice on payment of costs. Complainant intended to file suit in the State Court and vary the allegations so as to avoid removal. The Court of Appeals reversed, stating that the District Court should pass upon the motion to dismiss for laches.

Respectfully submitted,

GENERAL MOTORS CORPORATION,
a corporation,
Petitioner,

By ALVIN G. HUBBARD,
REESE HUBBARD and
DOMINICK VARRAVETO, JR.,
Its Attorneys.

HUBBARD, HUBBARD & DORGAN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

GENERAL MOTORS CORPORATION,
Petitioner,

vs.

CHRIS BOLTEN,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Judge is published in 71 F. Supp. 851. It is printed in the record (R. 22, 23). The opinion by the Court of Appeals is reported in 180 F. (2d) 379. It is in the record (R. 46).

JURISDICTION.

The court has jurisdiction under Title 28 United States Code, Sec. 1254.1.

STATEMENT OF CASE.

For brevity the Court is respectfully referred to the petition (*supra*, pp. 3-5).

SPECIFICATION OF ERROR.

1. The Court of Appeals erred in holding that under Rule 41 (a) (2) of the Rules of Civil Procedure, the District Court is bound to allow a plaintiff's motion to dismiss without prejudice.

2. The Court of Appeals erred in holding that the motion to dismiss without prejudice must be granted regardless of the state of the proceedings.

3. The Court of Appeals erred in reversing the judgment for petitioner.

SUMMARY OF POINTS.

I.

After the answer had been filed and the motion for summary judgment on the ground of limitations, had been under advisement for 19 days, the District Judge was vested with discretionary power to allow or to deny a motion for leave to dismiss without prejudice. The court might deny a dismissal, where the purpose was to institute another suit in another jurisdiction where the Statute of Limitations had not run.

U. S. v. *Pac. Fruit* (9th Cir. 1943), 138 F. (2d) 367.

Rollison v. *Wash. Nat. Ins. Co.* (1949, 4th Cir.), 176 F. (2d) 364 at 367.

Love v. *Mason* (1946 D. C. La.), 66 F. Supp. 753.

Henjes v. *Aetna Ins. Co.* (1941 D. C. N. Y.), 39 F. Supp. 418.

Wall v. *Conn. Mutual Life Ins. Co.* (1941 D. C. Ga.), 2 F. R. D. 244.

Cinn. Traction Bldg. Co. v. *Pullman Standard Car Co.* (D. C. Del., 1938), 25 F. Supp. 322.

Roth v. *Great Atlantic & Pacific Tea Co.* (D. C. Ohio, 1942), 2 F. R. D. 182.

Colonial Oil Co. v. *American Oil Co.* (D. C. S. C., 1943), 3 F. R. D. 29.

II.

After it appeared the motion for summary judgment was well founded, the court was not bound to permit the dismissal of the action without prejudice in the absence of any equitable circumstances warranting such dismissal.

International Shoe Co. v. *Cool* (1946, 8th Cir.), 154 F. (2d) 778 at 779, 780.

Young v. *So. Pacific Co.* (1928, 2nd Cir.), 25 F. (2d) 630.

ARGUMENT.

I.

When respondent made his motion to dismiss without prejudice and without costs, the court had had under advisement the motion for summary judgment for nineteen days. Respondent's motion was attended by no equitable circumstance. Respondent had admittedly recovered on his claim in Missouri. He did not explain why he in lieu of his employer was suing. Respondent had brought suit in Chicago far from the scene of the accident and the residence of the witnesses. On the record the defendant was entitled to judgment. Because the court was ready to pronounce judgment for defendant respondent then made his motion to dismiss.

Under the holding in *U. S.* v. *Pac. Fruit,* 138 F. (2d) 367, the court was vested with a discretion to allow or deny the motion. The same holding was made in *Rollison* v. *Wash. Nat. Ins. Co.,* 176 F. (2d) 364 at 367.

In *Love* v. *Mason,* 66 F. Supp. 753, defendant moved to dismiss on the ground of limitations. Plaintiff moved to dismiss without prejudice in order that he might commence a suit in a jurisdiction where the Statute of Limitations had not run. Judgment for defendant.

In *Henjes* v. *Aetna Ins. Co.,* 39 F. Supp. 418 the court denied the motion to dismiss without prejudice because it appeared that the plaintiff intended to institute another action.

In *Wall* v. *Conn. Mutual Life Ins. Co.,* 2 F. R. D. 244 the plaintiff stated that she had made a technical error in having the *ad damnum* more than $3,000. The court denied the motion to dismiss without prejudice on the ground that

the plaintiff was going to institute another action in another court.

In *Cinn. Traction Bldg. Co.* v. *Pullman Standard Car Co.*, 25 F. Supp. 322, the court denied a motion to dismiss without prejudice on the ground the defendant had spent considerable time and money for preparation and was entitled to have the matter decided.

In *Roth* v. *Great Atlantic & Pacific Tea Co.*, 2 F. R. D. 182 the Supreme Court of Ohio rendered a decision bearing upon the merits of controversy. Defendant moved for summary judgment. Plaintiff moved to dismiss without prejudice at plaintiff's costs. The court granted the motion for summary judgment.

In *Colonial Oil Co.* v. *American Oil Co.*, 3 F. R. D. 29 the plaintiff filed suit in the District Court, obtained a judgment on a verdict which was reversed because of the court's instruction on punitive damages. Plaintiff moved to dismiss without prejudice. Denying the motion the court held that Rule 41 (a) (2) made dismissal without prejudice discretionary.

The practice has been uniform that plaintiff does not have a right to dismiss after answer has been filed. The matter rests in the sound discretion of the trial court taking into consideration all the facts and circumstances. The end of Rule 41 (a) (2)—"*Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice."—clearly evinces a discretionary power in the court to specify in the order that the dismissal is with prejudice.

II.

When the motion for leave to dismiss without prejudice and without costs was made, the District Court had had under advisement a motion for summary judgment for nineteen days. The petitioner was clearly entitled to judgment upon its motion.

In *International Shoe Co.* v. *Cool,* 154 F. (2d) 778, the court allowed dismissal without prejudice after it had indicated that it would direct a verdict. The Court of Appeals relying upon Rule 41 (a) (2) stated that the discretion was not an arbitrary one. It reversed the judgment directing the District Court to enter judgment dismissing plaintiff's action on its merits.

In *Young* v. *So. Pacific Co.,* 25 F. (2d) 630 the court allowed the motion to dismiss without prejudice when it had under advisement defendant's motion to dismiss on the ground of laches. The Court of Appeals for the Second Circuit held this was reversible error.

No case cited by the Court of Appeals construes Rule 41 (a) (2) as requiring the District Court to allow dismissal without prejudice (R. 48, 49, 50).

In *Hydraulic Press Mfg. Co.* v. *Williams White Mfg. Co.,* 165 F. (2d) 489, (R. 48), the court denied plaintiff's motion to dismiss without prejudice. The Court of Appeals affirmed.

In *Home Owners Loan Corp.* v. *Hoffman,* 134 F. (2d) 314 (R. 48), the District Judge permitted the plaintiff to dismiss without prejudice. The Court of Appeals reversed, holding that the District Judge abused his discretion in not requiring the plaintiff to pay costs. Insofar as the Court of Appeals discussed the question here involved, the opinion conflicts with the opinion of the Seventh Circuit.

Insofar as *Reardon* v. *Chapman,* 169 F. (2d) 909, (R. 49), bears on the question here involved, it is diametrically contrary to the holding of the Court of Appeals herein.

Titus v. *Wells Fargo, etc.,* 134 F. (2d) 223 (R. 50), involved an agreement made in California not to plead the Statute of Limitations. The agreement was enforceable in California. It was enforceable in Washington, D. C. where the parties were resident. The Court of Appeals held that in the State of Texas where the suit was begun, such agreement was contrary to public policy. It reversed the judgment in plaintiff's favor remanding the case, stating that the District Court should allow a dismissal. No motion was ever made to dismiss without prejudice. Rule 41 (a) (2) of the Rules of Civil Procedure was never mentioned.

Thus we respectfully submit that the judgment of the Circuit Court of Appeals for the Seventh Circuit is clearly erroneous, that it establishes a precedent which will create confusion, and it should be reversed.

Respectfully submitted,

GENERAL MOTORS CORPORATION,
a corporation,
Petitioner,

By ALVIN G. HUBBARD,
REESE HUBBARD and
DOMINICK VARRAVETO, JR.,
Its Attorneys.

HUBBARD, HUBBARD & DORGAN,
Of Counsel.

APPENDIX.

MISSOURI REV. STAT. 1939, SEC. 1014:

"Where a third person is liable to the employee * * * for the injury, * * * the employer shall be subrogated to the right of the employee * * * against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee, but such employer may recover any amount which such employee * * * would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer, after deducting the expenses of making such recovery shall be paid forthwith to the employee * * *, and shall be treated as an advance payment by the employer, on account of any future installments of compensation."